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Issue date: 07Feb2002

In the Matter Of:
David W. Pickett
Complainant,

CASE NO.: 2001-CAA-00018

v.

Tennessee Valley Authority,
Respondents

Recommended Decision and Order

Decision

Contents

Procedural History

On July 20, 1999, David W. Pickett (hereinafter "Pickett"), a former employee of the Tennessee Valley Authority, ("TVA"), filed a complaint alleging that TVA and two individuals engaged in discriminatory acts of retaliation against him in violation of various environmental whistleblower statutes, including the Clean Air Act, 42 U.S.C. 7622, (CAA); the Comprehensive Environmental

Response, Compensation, and Liability Act, 42 U.S.C. 9610, (CERCLA); the Solid Waste Disposal Act, 42 U.S.C. 6971, (SWD); the Safe Drinking Water Act, 42 U.S.C. 300j-9,(SDW); the Federal Water Pollution Control Act, 33 U.S.C. 1367,(FWPC); and the Toxic Substances Control Act, 15 U.S.C. 2622,(TSC), when they petitioned the Department of Labor, Office of Workers' Compensation Programs (OWCP) to terminate the disability benefits Pickett was receiving under the Federal Employees Compensation Act (FECA), and then allegedly refused to rehire him. The FECA benefits program is administered by the OWCP. On August 9, 2000, that claim was dismissed by Order of another administrative law judge, on the basis that the Complainant had failed to file in a timely manner.[1] On November 16, 2000 the Administrative Review Board ("ARB") denied Complainant's requests for reconsideration. I understand that this action has been appealed. *See* ALJ-15, 10 ; Transcript of the September 17th conference, 28.

On March 30, 2001, Pickett filed the current claim alleging blacklisting, against Tennessee Valley Authority, the TVA Inspector General, TVA Inspector General (IG) investigator Craig Yates[2] and TVA Chairman Craven Crowell. According to the complaint, in retaliation for Mr. Pickett*s:

> protected activity in pursuit of his pending DOL case against TVA, Inspector General, pending before the Administrative Law Judge. Respondents have harassed Mr. Pickett, visiting an Oak Ridge Fabricators and President Scott E. Green[3], a friend of Mr. Pickett*s demanding to see records of Mr. Pickett*s earning of some $1500 in legal income while his disability leave was suspended pending his successful appeal to the DOL Employee Compensation Appeal Board (ECAB), which ruled in Mr. Pickett*s favor on November 28, 2000.

Pickett alleged further:

> Without making an appointment. Respondent Yates went to Mr. Green*s [a former employer of Mr. Pickett] place of business today, first demanding that an employee provide business records. Then meeting with Mr. Green, Respondent Yates wasted some thirty minutes of his time, with customers waiting, making illegal blacklisting remarks to the employer, violating Mr. Pickett*s whistleblower and privacy rights by:
>
> a. stating that Mr. Pickett was a malingerer:
> b. stating that "our doctors" had determined that Mr. Pickett was not hurt and could go back to work;
> c. making fun of Mr. Pickett for living at home with his parents at age 36;
> d. violated Mr. Pickett*s right to confidentiality by revealing he was receiving "full disability" and TVA had recently 'cut him a check for $50,000";
> e. repeatedly demanding to see Mr.Green*s payroll1 check and computer records;
> f. stating that DCL OWCP had sent him there to investigate, claiming he — was not there for TVA;
> g. asking how much money Mr. Pickett made;
> h. telling him specific details of Mr. Pickett*s case:
> i. repeatedly threatened him with a subpoena for business records;
> j. asked how he would feel if someone said their back was hurt and paid them for full disability and they went and worked for someone else;
> k. telling him about Mr. Pickett*s softball and other activities;

l. stating that his back hurt but he had to work everyday:

m. stating that his 20 year old son wanted to move out but he told him he had to pay his own way when he moved out and didn*t understand why someone 38 years old still lived at home. obsessing on the issue;

n. discussing matters in front of Mr. Green*s secretary, who entered the conference room, not waiting for her to leave: and

o. stating that Mr. Pickett*s case would not look good in front of a jury, which would find Mr. Pickett to be a malingerer.

Mr. Green informed Respondent Yates that Mr. Pickett did nothing wrong and would have starved without help from Mr. Pickett's parents and friends. Thereupon, Respondent Yates repeatedly threatened to obtain a court subpoena for business records regarding the $1500 in income.

Respondent Yates told Mr. Green he was looking for Mr. Pickett. In response. Mr. Pickett-called Mr. Yates, who proceed to intimidate and harass him via telephone. Respondent Yates was instructed to contact Mr. Pickett*s counsel.

According to the complaint and additional pleadings and arguments on the record, Pickett expressed a theory that TVA had engaged in a pattern of animus against Pickett; that any investigation of the workers' compensation claim was only a pretext to blacklist and otherwise diminish Pickett. Initially, Pickett requested a remand of the claim to the Department of Labor, Occupational Safety and Health Administration ("OSHA"), on the basis that they did not investigate this matter.[4] That request was denied by another administrative law judge.[5] At first, this case had been filed as an Energy Reorganization Act case[6], but I entered an order closing out that case, and adopting all of those pleadings.

Prior to hearing, TVA moved for summary judgment (ALJ-11). Pickett filed a response entitled "Motion to Strike an Improper Motion for Summary Judgment and Objection to TVA's Misleading Arguments" (ALJ-13). Both contained affidavits. A prehearing conference was held on September 7, 2001, at which time I ruled that this matter would be held in abeyance (ALJ-15). The standard for granting summary decision is set forth at 29 C.F.R. §18.40(d). This section, which is derived from Fed. R. Civ. P. 56, permits an ALJ to recommend summary decision for either party where "there is no genuine issue as to any material fact." 29 C.F.R. §18.40(d). The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. ***Gillilian v. Tennessee Valley Authority***, 91-ERA-31 (Sec'y 8/28/95) (Citing ***Anderson v. Liberty Lobby, Inc***., 477 U.S. 242, 247 (1986); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986)). The determination of whether a genuine issue of material fact exists must be made viewing all the evidence and factual inferences in the light most favorable to the non-movant. Id. (Citing ***OFCCP v. CSX Transp., Inc***., 88-OFC-24 (Asst. Sec'y 10/13/94)). See Also ***Laniok v. Advisory Committee***, 935 F.2d 1360 (2d Cir. 1991) (denying summary judgment based on the existence of genuine issues of material fact which the trial court had incorrectly assumed in favor of moving party); ***George v. Mobil Oil Corp***., 739 F.Supp. 1577 (S.D.N.Y. 1990) (denying summary judgment even though many of the Bormann factors, as discussed below, weighed in defendants' favor because genuine issues of material fact remained as to whether plaintiff voluntarily executed the release). Because, after a review of the

case law presented and the affidavit material, I determined that there were issues of material fact that were in dispute, the motion and counter-motions were denied pending receipt of testimony. At the time, I also questioned whether there was an absolute privilege for the actions of Yates in investigation. A second prehearing conference was held on September 17, 2001.

A hearing was held in Knoxville, Tennessee from September 19 to 21, 2001. The Complainant is represented by Edward A. Slavin, Jr., Esquire, St. Augustine, Florida. The Respondent is represented by Maureen H. Dunn, Esquire, TVA General Counsel, Thomas F. Fine, Esquire, Assistant General Counsel, Linda J. Sales-Long, Esquire, and Dillis D. Freeman, Jr., Esquire. Mr. Fine and Ms. Sales Long tried the case for TVA. Thirty three (33) administrative law judge (ALJ) Exhibits were entered into evidence.[7] Fourteen (14) Complainant's exhibits ("CX") were admitted as were ten (10) TVA exhibits ("RX").[8] Pickett, Green, Yates, Donald Hickman, Debra Youngblood, Nancy Branham, and Dale Hamilton all testified. At the request of the parties, the record remained open to receive briefs. These have been received, and Mr. Slavin also filed a reply brief, Proposed Findings of Facts and Conclusions of Law, and a "Supplemental Citation and Notice of Filing". The transcript (hereinafter "TR") has also been received. All of these are hereby made a part of the record.

On January 2, 2002, Pickett submitted the "supplemental citation and notice of filing." Included was a newspaper item that set forth certain bonuses paid to TVA employees.[9] On January 4, TVA move to strike. TVA also argues that the article contains several layers of hearsay.[10] A party who wishes to add evidence to the record must show that new and material evidence has become available which was not readily available prior to the closing of the record. 29 C.F.R. § 18.54(c). At the end of the hearing, the record was closed. Pickett did not allege that the information was not readily available at the time of hearing, or that he is prejudiced in any manner, and therefore, there is no basis to reopen the record.

The parties stipulated to the following:

> 1. Pickett was formerly employed by the Tennessee Valley Authority.
> 2. Pickett was injured on the job while working for the Tennessee Valley Authority and collected benefits under the Federal Employees Compensation Act ("FECA") for at least some period of time.
> 3. Pickett filed a previous complaint with the Department of Labor under the employee protection provisions of a number of the environmental protection statutes.
> 4. The Office of the Inspector General ("OIG"), and in particular, Special Agent Craig Yates, was aware of that previous complaint.

(TR, 19-20).

At the conclusion of the hearing, I dismissed all the respondents other than TVA and TVA OIG. TR, 572-74, 579.[11] "Employers" are the only entities subject to being named in complaints under the employee protection provisions. There has to be some form of employment relationship between the complainant and the respondent. Cf. ***Stephenson v. NASA***, No. 94-TSC-5 (Sec'y July 3, 1995) (Secretary of Labor holding that only employers, and not individuals, may be held liable for violations of the employee protection provisions of the environmental statutes); ***Kesterson v. Y-12 Nuclear Weapons Plant***, No. 95-CAA-12 (ALJ Aug. 5, 1996) (dismissing individual employees where complainant failed to allege an employment relationship rather than a mere supervisory relationship);

Varnadore v. Oak Ridge Nat'l Lab., No. 95-ERA-1, at 6 (ALJ Sept. 20, 1995) ("Moreover, individuals who are not employers are not subject to liability under the employee protection provisions of the TSCA and the CAA."); ***Stephenson v. NASA***, *supra*, at 2 (ALJ June 21, 1994) ("The prohibition in both [the TSCA] and [the CAA] begin with the identical language '[n]o employer may discharge any employee or otherwise discriminate against any employee . . . .' It thus appears on its face that a person who is not, an employer is not subject to these statutory prohibitions and, thus, cannot be said to violate either employee protection statute."); see ***Wathen v. Gen. Elec. Co.***, 115 F.3d 400, 405 (6th Cir. 1997) ("[A]n individual employee/supervisor, who does not otherwise qualify as an 'employer,' may not be held personally liable under Title VII."); ***Pritchard v. S. Co. Servs., Inc.,*** 102 F.3d 1118, 1119 n.7 (11th Cir. 1996) ("Pritchard's remedy for any discrimination she may have suffered on account of her alleged disability lies against her employer, not individual officers of her employer."); ***Welch v. Cook County Clerk's Office***, 36 F. Supp. 2d 1033, 1041 (N.D. Ill. 1999) ("Because Defendants Teater, Robinson, Murray, Jackson-Hallen, and LaMont do not qualify as employers, the Title VII claims against them as individuals are dismissed.")

I am advised that the same issue was considered in a prior determination. I do not accept the prior determination as precedent or as collateral estoppel on this issue, but I accept that it may be instructive. The same result was reached by Judge Stuart Levin in Pickett's previous complaint under many of the same statutes he relies on here.[12]

At no time was Pickett employed by the TVA OIG. He states no basis whatsoever for naming OIG as a respondent. Indeed, he has not even alleged that he was employed by OIG. Pickett has not offered a single fact indicating or even alluding to the existence of any employment relationship between him and OIG. Nor has he cited to any law in support of his argument. Accordingly, no claim of retaliatory action may lie against the TVA OIG and OIG, as a separate entity, apart from TVA, is hereby dismissed from this action.

Pickett also moved to treat the Department of Labor, Office of Workers' Compensation ("OWCP") as a party to this proceeding. ALJ-14. I ruled that the Department of Labor is not an "employer" and that relief can be addressed only through the Department of Labor under the statute (See TR, 22).

Prior Acts and Pattern of Conduct

Both parties make reference to the prior action. The facts at issue in this case begin with the March 30, 2001 visit by Yates. The record, as I explain later, shows that because Yates had been the investigator in some prior actions involving Pickett, he had a potential motive and he had the opportunity to have committed some of the alleged conduct set out by the complaint. Pickett requests that I review the prior record to determine whether there has been a mistake of fact or law. However, none of the whistleblower acts and the regulations provide for this type of review. Later in this decision, I enumerate the nature and application of a qualified privilege, that is granted to Yates and TVA for an investigation of the FECA matter. Therefore, the communication of information relevant to the FECA case is not part of a pattern that is actionable. I find that Pickett fails to distinguish between those acts that are privileged and those that may be evidence of blacklisting. Moreover, I do not find that the acts that are alleged to bear similarity create any kind of a pattern of blacklisting against Pickett based on the current complaint.

However, as both parties have argued the same history, I accept that language from ***Pickett v.***

TVA, ALJ No. 2000-CAA-0009 (Aug. 9, 2000), appeal pending, ARB No. 00-076, is accurate:

> The record shows that [Pickett] worked for TVA at its Widows Creek Fossil Plant near Stevenson, Alabama. On February 11, 1988, he injured his left shoulder, subsequently filed for worker's compensation, and received disability benefits from 1988 to 1999. From time to time during the period 1988-1993, TVA offered, but Pickett declined to accept, light duty assignments compatible with his physical capabilities as determined by his physicians. At the same time, TVA challenged Pickett's entitlement to benefits and provided OWCP with a report from Pickett's physician confirming his physical capacity to perform the jobs he was offered. When OWCP maintained Pickett in pay status, TVA staff referred the matter to TVA's Inspector General (IG) for investigation.
>
> TVA's IG twice investigated Pickett. The IG's first report in 1991 confirmed Pickett's disability. Two years later, circumstances changed. Pursuing a "tip" that Pickett's activities were incompatible with his claim of total disability, the IG opened a new inquiry. Following an investigation, the IG, apparently impressed with Pickett's athletic capacity notwithstanding his total disability, reported numerous instances in which Pickett engaged in physical activities, including softball, golf, jogging, riding a stationary bike, Taichi, coaching youth basketball and baseball, and teaching Karate. In June, 1993, TVA submitted the IG's report to OWCP, and on October 1, 1993, TVA terminated Pickett's employment. Thereafter, OWCP, in 1994, advised Pickett that his benefits would be reduced. Facing a potential reduction in benefits, Pickett applied for re-employment, but TVA was, by then, in the process of downsizing its workforce and had no vacant positions suitable for Pickett.
>
> For the next five years, Pickett received FECA benefits including job training which afforded him an Associate's Degree in Engineering Technology from Pellissippi Community College. On January 25, 1999, an OWCP Senior Claims Examiner determined that Pickett had no continuing medical condition or disability as a result of his on-the-job injury of February 11, 1988, and recommended termination of his compensation. A month later, OWCP informed Pickett that his benefits would terminate. On March 9, 1999, Pickett notified TVA of OWCP's decision and requested a "starting date for employment." He also requested OWCP to reconsider its decision terminating his compensation and OWCP denied his request on April 30, 1999. Two and one half months later, Pickett filed his complaint alleging that TVA discriminated against him as an environmental whistleblower [slip op. at 2-3].

Pickett's FECA benefits were later restored after further review. ***Pickett & TVA***, ECAB No. 99-2220 (Nov. 28, 2000).[13]

Over TVA objections, the prior record was proffered, but the parties stipulated that the prior whistleblower decisions are part of this record (TR, 17). This case arises out of Pickett's activities during the period he was not collecting FECA benefits—February, 1999 through November, 2000. After Pickett was restored to the FECA rolls, he apparently informed OWCP that he had worked at Oak Ridge Fabricators for at least part of the time he was not collecting benefits (RX-3 at 2; see also TR, 470). This period also covers part of the time that the parties were engaged in Pickett's prior whistleblower claim.

Pickett alleges that TVA has committed a continuing offense against him and that I must consider

the claim history and TVA's alleged pattern of infractions in determining whether a *prima facie* case has been made. See Pickett's Proposed Findings of Fact. Normally, the prior claims, both the whistleblower claim and the FECA claim are administratively final.

However, I note that in a letter dated April 18, 2001, after Pickett filed this claim, G. Donald Hickman ("Hickman") in evaluating Pickett's current charges, including "unprofessional conduct" against Yates, discussed the prior whistleblowing claim pending at that time and stated that Brent Marquand, Esquire, represented TVA in the matter. (RX -10). This evidence precipitates the admission of the prior record, as it gives rise to the potential showing of a pattern of conduct.[14] In an abundance of caution, given the context of RX-10, I permitted Pickett an opportunity to present evidence on whether prior conduct could be proved. TVA filed a Third Motion *in limine*, requesting that I limit any testimony and exhibits at the hearing in this proceeding about the matters at issue in the first complaint.

During the course of the hearing, I admitted some evidence from the prior cases to permit Pickett to attempt to lay a foundation for the charge of whistleblowing, especially since the parties had stipulated that there had been a prior complaint of whistleblowing. In cases where retaliatory intent may be an issue, some evidence may appear to be of little probative value until the evidence is considered as a whole." ***Seater v. Southern California Edison Co.***, 95-ERA-13(ARB Sept. 27, 1996, slip op. at 6, n.6 See also ***Timmons v. Mattingly Testing Services***, 95-ERA-40 (ARB June 21, 1996.) I ruled on these matters on the record. The prior record was entered as exhibit CX-1 and is incorporated by reference into this record.[15] I also permitted Pickett to attempt to show a pattern of conduct under 29 CFR § 18.406 Habit; routine practice, which states:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

At this point in the discussion, I distinguish between the use of evidence of prior acts as a basis for the *prima facie* case, for use as impeachment and for use to fashion a remedy if the claim is proved. During the hearing, I made numerous rulings relative to the inclusion and exclusion on the basis of privacy, privilege and on the basis that some of the matters that Pickett requested went solely to the prior claim, were tangential to this case, were burdensome and were therefore, not admitted.[16] Therefore, the Motion *In Limine* was accepted in part, but rejected for the most part.

Although Pickett alleged that there were similar acts of conduct relating to an overzealous investigation of Pickett's FECA claims, Pickett failed to show that Yates' prior conduct relates to Pickett's whistleblowing activity. I do not find any activities related to the FECA claim are actionale for reasons set forth *infra*.

Specifically, Pickett alleges that the following shows a pattern of blacklisting:

1. TVA's initiation of retaliatory OIG investigations (CX-1-5A,B,C,D,E,F,G);
2. The IG's "investigating" Mr. Pickett incessantly, (CX-1--5A,B,C,D,E,F,G), despite TVA's knowledge he was entitled to compensation (CX-1-5C) and despite "second opinion" medical opinions that he was disabled under OWCP standards (CX1-8);
3. Distribution of defamatory information to a doctor and DOL (CX1-5F,G);
4. Refusal to re-employ Mr. Pickett, orchestrated with Susan Findley of the TVA Office of

General Counsel (OGC), (CX-1-9A&B);

5. Referral of Mr. Pickett to biased physicians who rendered biased "second opinions" contrary to the medical evidence (CX-1-7A&B, 1-8,1-10A,B,C,D,E,F,G); and

6. TVA's admitted destruction of evidence (CX-1-12 & 1-13).

Such matters as surveillance, the alleged "firing" and the use of investigation are not proved to be pattern of acts and are unconvincing as a "pretext" for blacklisting. Pickett has a proof problem in that the time line on whistleblowing begins with the filing of the 1999 complaint and most of the activity that Pickett alleges are elements of blacklisting took place many years prior to that. Judge Levin ruled and I agree, after a thorough review, that the 1999 claim was not timely as to those allegations. Pickett fails to establish a nexus between acts that occur as part of the FECA claim that was ongoing from 1988 to the present and those activities. I also note that although the acts were supposedly "incessant", I note that the time line shows that there was limited investigation activity. Most of the conduct that Pickett describes occurred in the period 1991 to 1993. See CX-1, 5D and CX- 2 1-14, CX-10. These events were the basis for the dismissal of the 1999 complaint as untimely. I also note that there was no pattern to the investigations.

After a complete review of the entire record, I reject Pickett's theory regarding past acts in that he failed to show that there was any basis to reopen, revise or revisit prior cases. The whistleblower acts do not provide a mechanism for modification and do not establish a procedure to review prior decisions. In any event, Pickett failed to prove that there are mistakes of fact or law, new and material evidence or any other basis to reopen or revise any of the prior actions. I find that none of the allegations made about the prior record are pertinent as to TVA liability. Despite the allegations relative to similar conduct, I find that the totality of the matters complained about are privileged activities, or relate to matters that are administratively final. See discussion, *infra*.

Moreover, Pickett's several motions to take adverse inferences and motions for default judgment on the basis of application of a conspiracy theory are denied. These are based on the assumption that there is a nexus between Pickett's FECA case and his 1999 case and the current one. Pickett has failed to show that there has been a pattern of conduct established by TVA, OWCP and/or OSHA to which adverse inferences can be taken.

Rendition of Facts

March 30, 2001 Interview

The Department of Labor ECAB ruled in Pickett's favor on November 28, 2000, in Pickett's FECA case (TR, 168). On March 30, 2001, Yates visited Oak Ridge Fabricators ("ORF") and its president, Green. Before Yates went to Oak Ridge Fabricators, DOL OWCP had sent a "Dear Madam" letter to the firm (RX-3), requesting information regarding the FECA case. Pickett emphasizes that Oak Ridge Fabricators does not employ any "madams." (TR, 52).

Yates testified that prior to this case, he had not formally investigated any whistleblower cases (TR, 59). Yates testified that his specialty was internal investigations, involving employee misconduct, with a sub-specialty in workers' compensation (TR, 60). However, Yates attended a meeting of TVA employees regarding Pickett's 1999 whitleblower complaint and participated in that meeting by providing information he had obtained in earlier investigations he had performed regarding Pickett's FECA claim. TR, 492. At the time of the interview, Yates knew that Pickett had filed a previous whistleblower claim

(Stipulation, TR, 61). Yates was authorized to go to Oak Ridge Fabricators by Dale Hamilton (Charles Dale Hamilton, "Hamilton"), manager of internal investigations for the Inspector General's Office, TVA, and Yates' supervisor. TR, 451. Green is a friend of Pickett (TR,44). Oak Ridge Fabricators is located in Oliver Springs, Tennessee, and is a machine shop that employees about twenty people. (TR, 28). Oliver Springs is a very small town. (TR, 156-7). As set forth above, Green advised Yates that he and Pickett were extremely good friends and that he did not want to get a friend in trouble (TR, 458, 460-61; see TR, 43). In response, Yates told Green that Pickett was not in any trouble as far as he knew (TR, 460). Pickett had reported his employment with Oak Ridge Fabricators to OWCP and the employment had been during a period of time he was not receiving FECA benefits (Id.). Yates explained that OWCP needed information about that employment as part of its process of determining what benefits Pickett was entitled to under workers' compensation (Id.).

Green acknowledged that Pickett had worked for him and that the firm would have records—such as a W-2 form, canceled checks—showing the amounts paid to Pickett (TR, 462). However, Green said that he would need a subpoena to produce those records (TR, 459-62). Yates told Green that a subpoena might not be necessary depending on the nature and duration of Pickett's employment (TR, 461, 463). Green voluntarily told Yates that he was aware that Pickett was having a difficult time and needed money (TR, 461). Green seemed co-operative. Yates reported that Green said that Pickett drove a light truck, answered the telephone and delivered machine parts in the Oak Ridge/Knoxville area (TR, 461-63).[17] He said that Pickett was paid $7 an hour and only averaged about one or two days a week, earning only about $1000 for all of 2000 (Id.).

According to Green, he could tell from Yates' "tone" that Yates did not like Pickett (TR, 33). He alleges that although he did not inquire about TVA's position regarding Pickett, Yates provided derogatory information about Pickett.[18]

Green reported that Yates stated that Pickett had received a lump sum for over fifty thousand dollars ($50,000.00) and was in current pay status for workers' compensation benefits (TR, 32-3, 35). According to Yates,

> He was concerned about him having trouble making it during this period of time, when his benefits were terminated. And I did tell him that he would have been eligible to receive -- I believe he would've been eligible to receive benefits reimbursement for the period of time that he was off, and that it was not uncommon for people like him on federal disability that were off for a two year period to receive in excess of fifty thousand dollars back pay. At the time, I didn't know exactly how much he had received.

TR, 467.

According to Green, Yates stated that although he[Yates] had aches and pains, he was able to work (TR, 33). "[H]e said that he had doubts about David's case, that you know, their doctors said he wasn't hurt, but David's doctors said he was hurt." TR, 37. "He asked me how I'd feel if one of my workers was, you know, saying his back was hurting, wasn't working and he went to work for somebody else." (TR, 38).

Green also alleges that Yates ridiculed Pickett. "[H]e said he couldn't believe somebody thirty-six years old still lived at home."TR, 40.[19] According to Yates, Yates asked Green where Pickett was residing, and when Green said that Pickett was with his parents, he made no derogatory remark (TR,

466-7). He did admit that he told Green he has a son who lives away from home part of the time (TR, 79-80).

Yates denied making any of the accusatory statements about Pickett attributed to him by Green (TR 77-79). He also denied having any discussion about Pickett's medical condition or about doctors' opinions (TR, 467).

After some additional conversation, Yates left the premises, advising Green that he doubted he would be back, and he never returned (TR, 69, 78, 80-81, 464-67, 479). Green was the only person he interviewed about OWCP's information request (TR, 74, 465). Later that day, Pickett telephoned Yates, objecting to the visit. He left a message on Yates' answering machine (TR, 468; RX-6).

Green testified that he did not feel personally threatened by Yates (TR, 41). He stated that Pickett had not been fired, and that he quit the job voluntarily (TR, 42). Green would re-hire Pickett if Oak Ridge Fabricators needed his services (TR, 43).

According to Pickett, Yates knew of Pickett's environmental protected activity in raising concerns in the Widows Creek Steamplant workplace, including environment, safety and health concerns; including his concerns about overflowing scrubbers and resulting air and water pollution (TR, 157-60, 164, 508).

Green testified that Yates tried to depict Pickett in a poor light. "If I didn't know David, I would walk away thinking terrible of him." (TR, 51). To protect the record, Green kept detailed notes of Yates' visit.

Pickett's Testimony

Pickett testified that he has a degree in environmental engineering. He worked at TVA from 1985 until 1988, in the student generating plant training program. In 1987, he began work at the Widows Creek Fossil Plant in Stevenson, Alabama (TR, 150-1).

According to Pickett, Widows Creek is "at its very best, I would say is probably the nastiest place I've ever seen in my life.... from the very first day that I walked in the plant, I cited concerns over oil in the floors, flash coal in the floors, you know, scrap iron laying everywhere. I mean, you know, instead of a power plant, it looked like a garbage dump. It looked like a scrap iron yard. You know, nothing -- nothing was in order. You know, papers laying everywhere, sweepers, that's what they call them, it's what those laborers and janitors ride to sweep the floors, those things parked outside, wheels falling off of them, tractor trailer full of parts, you know, parked right in the middle of your walk way walking into the plant, just full of garbage and trash. They had trailers, you know, like a trailer park trailer, I reckon that they used for a training program of their own. Each plant has its own training program. They had one of those out there and you know, just rusted, nasty looking. The smell was terrible. It was -- it was not what I expected." TR, 151-2.

Pickett alleges that he registered environmental complaints about scrubbers and scrubber tanks when he was an employee at Widows Creek (TR, 153-4). Pickett testified that he told Yates in 1992 about the alleged environmental problems at Widows Creek "and TVA in general." TR, 157.

OSHA never interviewed him regarding this claim. To Pickett's knowledge, OSHA never investigated the complaint filed on March the 30th, 2001.

When Green reported that Yates did on March 30th, he was upset.

> ...I felt like my rights had been violated again. He had came out to my house once before years ago. And he had randomly threw my name all around town. The man even went to

> my church. The man even knew what church I went to. I mean, I wouldn't even go to my church for years because the man even went to my church in 1992 when he come out. And I thought, you know, here we go again. Here, he's going to come out and start this again, make me look like some kind of drug lord or some kind of villain or you know, some kind of government swindler or something of that nature.

TR, 161.

Pickett won his Department of Labor, Employee Compensation Appeal Board case on November 28th, 2000. TVA has not offered him reinstatement (TR, 162).

TVA's position is that Pickett is not a TVA employee. TVA "fired" Pickett in 1993 "right before I was graduating college, " while he was a student under the OWCP Federal Employee Compensation Program. "...they just said I wasn't available for work." TR, 162-3.

Green had told him that he received a letter from OWCP about employment at Oakridge Fabricators. On March 30, "Green called me. And I was on my cellphone. And he goes, 'TVA, one of their people has been out here investigating you.' And I -- we was both in shock. And I said, 'we will discuss it no more, because I'm on a cellphone and I don't want scanners or no one else to pick up on this.' And so then I went to his, straight to his business, which was like a couple hours after it happened. And then that's when we discussed what Mr. Yates had said." TR, 164-166.

Green also talked to Yates. said that OWCP had sent to investigate. " And he explained to me that it was just a job, that that was part of his job, what he was doing. "

Green is the only person that Pickett knew that Yates spoke to during the investigation (Id).

The OIG Investigation and Response to the OSHA Complaint

On March 30, Pickett called Yates to advise that he did not like the fact that he had been investigated. Pickett took the position that the investigation was a *per se* incident of harassment. See Pickett's Brief. Yates did not open a file on the investigation and did not draft an O2 form, which Pickett argues should have been done (See Hamilton's testimony TR, 417). Yates testified that there are times,

> ...when we talk to people if we deem that the information we have obtained is not that -- there's not very much to it, you know, we don't have to do a record of interview in that situation. It's not done in every single situation where you talk to someone.

TR, 70. He later said that an O2 form would have been limited to the interview while the report included the reason for the interview (TR, 82).

Once Pickett's complaint was received, Yates was instructed by his supervisor to draft a report. TR, 69, 81, 419. According to Hamilton,

> There is a policy in our office that when an allegation is made against an agent, that you have to look at the circumstances that surround that.
>
> In fact, I have to make a recommendation to Mr. Hickman as to what I think, if there was any misconduct or not. And then he actually has to respond to the IG as to whether there should be a formal investigation or not.

TR, 419-20. Hamilton spoke to Yates, read the Pickett complaint, and they determined that the March 30 incident was a "preliminary inquiry" and found "negative information", meaning no further action was required (TR, 82, 420).

On April 9, Yates rendered a report describing the March 30 interview. With respect to the allegations that he had disparaged Pickett to Green, he noted:

> Although Green and this agent talked briefly in generalities about workers* compensation, sports, family, etc., there was no reference to Pickett*s workers* compensation claim or personal family situation. This agent made no derogatory statements concerning Pickett during the brief conversation with Green. In fact, Green explained how well Pickett was liked by people in the Oliver Springs community. This agent responded to Green by admitting to hearing about Pickett*s popularity in the community and that Pickett was even involved in church and community service work.

RX-5,2. Upon receipt, Hamilton spoke to Yates again, and on April 12 drafted the letter recommending no further action (RX-7). This letter, responding to Mr.Slavin, Pickett's attorney, had included some allegations in a DOL filing that alleged professional misconduct by Special Agent Yates (Id). Hamilton advised that in his opinion, Yates had conducted himself in a professional manner (Id). Hamilton testified that there was no need to open a file on Pickett (TR, 422-3).

Hamilton admitted that Yates is a biased witness (TR, 432). Hamilton did not ask Yates to verify his statement and during the period from March 30 to April 12, when Hamilton wrote a letter exonerating Yates for any improper conduct during the March 20 interview, Yates was not placed under oath (TR, 433; RX-7).

Hickman testified that although he had not read Pickett's complaint and did not know exactly what the charges were against Yates, he relied on "Yates' integrity":

> I'm relying on the integrity of Mr. Yates to tell me the truth. I have never experienced a situation where he has done anything, other than that. He did give me a written explanation of his conduct on the day in question. And I saw no reason to recommend to the IG that a formal internal investigation of serious professional misconduct, I saw no need for such an inquiry to be initiated.

TR, 322. After reviewing Yates' report and "recognizing that Mr. Yates simply was conducting routine business at Oakridge Fabricators, I agreed that no formal inquiry was warranted." TR, 344. Although Hickman accepted Yates' version, he advised that if Pickett "gives me information that is credible that alleges that TVA or someone at TVA took some affirmative action to discriminate against him because he was a whistleblower, we would be interested in looking at that..... (TR, 352).

Hickman testified that IG investigators "generally understand" the provisions of whistleblower regulations (TR, 324). However, he admitted that his department had never held training sessions involving blacklisting (Tr, 325).

Blacklisting

Whistleblower provisions "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment." ***Passaic Valley Sewerage Comm'rs v. Department of Labor***, 992 F.2d 474, 478 (3d Cir. 1993). A blacklist is defined as a list of persons or organizations that have incurred disapproval or suspicion or are to be boycotted or otherwise penalized.[20] Therefore, blacklisting is a form of reprisal.[21] "Blacklisting" is marking an individual "for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." ***Black's Law Dictionary***, 154 (5th Ed. 1979). "Blacklisting is the quintessential

discrimination, i.e., distinguishing in the treatment of employees by marking them for avoidance." ***Leveille v. New York Air National Guard***, 94-TSC-3 and 4 (Sec'y Dec. 11, 1995). Blacklisting is "insidious and invidious [and] cannot easily be discerned." ***Egenrieder v. Metropolitan Edison Co./G.P.U.***, 85-ERA-23 (Sec'y Apr. 20, 1987). Blacklisting violates whistleblower laws regardless of the recipient of the information. See ***Earwood v. Dart Container Corp.***, 93-STA-16 (Sec'y Dec. 7, 1994) and ***Gaballa v. The Atlantic Group, Inc***., 94-ERA-9 (Sec'y Jan. 18, 1996)(reference checking company). Under the Clean Air Act[22], the following is set forth, as pertinent :

> (a) Discharge or discrimination prohibited:
>
> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
>
> > (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
> >
> > (2) testified or is about to testify in any such proceeding, or
> >
> > (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.
>
> (b) Complaint charging unlawful discharge or discrimination; investigation; order
>
> > (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.
> >
> > (2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.
> >
> > (B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation,

and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(g) Deliberate violation by employee. Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter.

The implementing regulations state in part pertinent:

(b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, *blacklists*, discharges, or in any other manner discriminates against any employee because the employee has:

(1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;

(2) Testified or is about to testify in any such proceeding; or

(3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

(Emphasis added). 29 CFR §24.2(b). Note that there are similar provisions in the other acts involved in this case.

The fact that a possibly blacklisted complainant was not refused employment or did not suffer any actual employment injury does *not* shield a respondent from liability. ***Leveille*** *supra*. In ***Leveille***, the blacklisting was simply marking an employee for avoidance in employment because she engaged in protected activity; the communication of an adverse recommendation simply was evidence of a decision to blacklist the employee. The Secretary indicated that he would follow his finding in ***Earwood v. Dart Container Corp***., 93-STA-16 (Sec'y Dec. 7, 1994), that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result." A former supervisor's statement that he would not rehire a worker may be an instance of blacklisting. ***Webb v. Carolina Power & Light Co.***, 93-ERA-42 (Sec'y July 14, 1995), citing ***Beckett v. Prudential Ins. Co. of America***, No. 94-CV-8305 (SAS), 1995 LEXIS 6513 (S.D. N.Y. May 15, 1995)("Poor recommendations ... may be discriminatory practices if done in direct retaliation for a former employee's opposition to an unlawful employment practice"); compare ***Smith v. Continental Ins. Corp.***, 747 F.Supp. 275, 281 (D. N.J. 1990), aff'd, 941 F.2d 1203 (3d Cir. 1991) (rejecting claim of blacklisting where plaintiff admitted she was unaware of any negative verbal or written job references to prospective employers).

In ***Odom v. Anchor Lithkemko*** 96-WPC-1 (ARB Oct. 10, 1997), the ARB found that ***Gaballa v. Atlantic Group, Inc***., 94-ERA-9 (Sec'y Jan. 18, 1996), does not necessarily prohibit an

employer from providing a negative reference once the employee has filed a retaliation claim. Rather, to be discriminatory, such a communication must be motivated *at least in part* by protected activity. The ARB noted that in Gaballa, the employer explicitly mentioned the employee's protected complaint of retaliation. It is unlawful discrimination when providing information concerning a complainant's employment to an outside party to refer to the complainant's complaint about discrimination. Discriminatory referencing violates the ERA regardless of the recipient of the information. ***See Earwood v. Dart Container Corp***., 93-STA-16 (Sec'y Dec. 7, 1994); ***Gaballa v. The Atlantic Group, Inc***., *supra*.

In ***Frady v. Tennessee Valley Authority***, 92-ERA- 19 and 34 (Sec'y Oct. 23, 1995), the Complainant was unable to establish a claim of blacklisting where there was no evidence that any employee of the Respondent had intentionally interfered with any employment opportunity that the Complainant may have had available through a contractor that provided inspectors to the Respondent.

A verbal statement made to hiring personnel can constitute blacklisting; no document or written list is required. ***Webb v. Carolina Power & Light Co***., 93-ERA-42 (Sec'y July 14, 1995), citing ***Holden v. Gulf States Utilities***, 92-ERA-44, slip op. at 3, 13 n.8. (Sec'y Apr. 14, 1995).

Burden of Proof

A complainant has the initial burden to establish a *prima facie* case of discrimination for a protected conduct. To prove a prima facie case under the employee protection provisions of the environmental whistleblower statutes an employee must establish that:

1. both the employer and the employee are subject to the statute;
2. the employee was discharged or otherwise discriminated against with respect to compensation, terms, privileges, or conditions of employment; and
3. the alleged discrimination arose because the employee was engaged in activity protected by the statute.

DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983)(DeFord I); ***Mackowiak v. University Nuclear Systems, Inc***., 735 F.2d 1159, 1162 (9th Cir. 1984); 29 C.F.R. § 24.2. To establish a *prima facie* case of retaliation, the employee must show that he engaged in protected conduct, that the employer was aware of it and that the employer took some adverse action against him. The employee must present evidence sufficient to raise the inference that protected activity was the likely reason for the adverse action. ***Dartey v. Zack Company of Chicago***, 82-ERA-2 (Secretary, April 25, 1982), quoting ***Cohen v. Fred Mayer, Inc***., 686 F.2d 793 (9th Cir. 1982); see also ***Johnson v. University of Cincinnati,*** 215 F.3d 561 (6th Cir. 2000)[23]; see ***Booker v. Brown & Williamson Tobacco Co.,*** 879 F.2d 1304, 1312 (6th Cir. 1989); ***Morris v. Oldham County Fiscal Court,*** 201 F.3d 784, 791-92 (6th Cir. 2000); ***Bechtel Constr. Co. V. Secretary of Labor***, 50 F.3d 926 (11th Cir. 1995).

However, if the trier of fact determines that a respondent's adverse treatment of a complainant was motivated both by illegal and legitimate reasons, then the dual motive test becomes applicable. Under the dual motive test, the respondent, in order to avoid liability, has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. ***Zinn v. University of Missouri***, 93-ERA-34, 93-ERA-36 (ALJ May 23, 1994);

Talbert v. Washington Public Power Supply System, 93-ERA-35, slip op. at 4 (ARB Sept. 27, 1996), quoting ***Carroll v. U.S. Dep't of Labor***, No. 95-1729, 1996 U.S. App. LEXIS 3813 at *9 (8th Cir. Mar. 5, 1996), quoting ***Stacks v. Southwestern Bell Yellow Pages, Inc.***, 996 F.2d 200, 202 (8th Cir. 1993). In ***Talbert***, the Board continued that "[e]vidence of actions or remarks of an employer tending to reflect a discriminatory attitude may constitute direct evidence. ... such evidence does not include stray or random remarks in the workplace, statements by nondecisionmakers or statements by decisionmakers unrelated to the decisional process." Id., slip op. at 4

A complainant must make a showing by a preponderance of the evidence that the protected activity was a contributing factor to the unfavorable personnel action alleged in the complaint -- is reasonable and entitled to deference by the courts. See 42 U.S.C. § 5851(b)(3)(D); ***Johnson v. Bechtel Const. Co.***, 95-ERA-11, slip op. at 2 (Sec'y Sept. 28, 1995); ***Dysert v. Florida Power Corp***., 93-ERA-21 (Sec'y Aug. 7, 1995), appeal docketed ***Dysert v. Sec'y of Labor***, No. 95-3298 (11th Cir. Sept. 28, 1995); ***Yule v. Burns Int'l Security Serv***., 93-ERA-12, slip op. at 7-13 (Sec'y May 24, 1995); see generally ***Grogan v. Garner***, 498 U.S. 279 (1991). In ***Creekmore v. ABB Power Systems Energy Services, Inc***., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996), the Deputy Secretary stated that "[o]ne way for a complainant to establish that his protected activities were a contributing factor in the adverse employment action is to show that the reason the respondent gave for taking the action was pretextual." The ERA burdens of proof are applicable to claims arising under the TSCA whistleblower provision. ***Wagoner v. Technical Products, Inc***., 87-TSC-4 (Sec'y Nov. 20, 1990) (noting that in practice, those burdens of proof had been applied in cases arising under all of the statutes implemented in 29 C.F.R. Part 24, including SWD, CERCLA, CAA, STAA).

"Burden of proof," as used in the this setting and under the Administrative Procedure Act is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof". "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d). The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).

Pickett's Status

Pickett, having filed and participated in the prior whistleblower actions bearing his name, "commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a)" and is therefore a member of a class protected under 29 CFR §24.2. Whether he is a current or former TVA employee, he is protected from blacklisting and adverse actions arising out of the employment relationship. ***Robinson v. Shell Oil Co.,*** 519 U.S. 337 (1997). TVA acknowledges in its brief that ***Robinson*** provides protection against any retaliation by TVA for his filing the previous complaint under the employee protection provisions of the environmental statutes.

Moreover, although the record shows that Pickett's employment was terminated, his workers' compensation claim remained pending, and as of the date of his complaint, he was ostensibly in payment status. Pickett's FECA benefits were restored by ***Pickett & TVA***, ECAB No. 99-2220 (Nov. 28, 2000).[24] Therefore, for FECA purposes, Pickett remained a TVA employee at the date of the alleged violation.

At the time of the interview, Yates knew that Pickett had filed a previous whistleblower claim (Stipulation, TR, 61). In fact, he attended a TVA meeting when the Pickett whistleblower case was discussed, and he was asked to provide background information about Pickett at that time (TR, 74, 492). According to the testimony, Pickett alleged that in 1992, Yates interviewed Pickett, with respect to his FECA case. At that time, Pickett allegedly told Yates that there were environment, safety and health violations at the Widows Creek Steamplant, where Pickett worked, including his charge that scrubbers were overflowing, resulting in air and water pollution; (TR, 157-60, 164). In his report, he noted that:

> Due to Pickett*s pending lawsuit with TVA, Brent R. Marquand, Attorney, General Counsel*s office, was contacted concerning OWCPs request. According to Marquand, assistance from our office should be no problem because OWCP was requesting the information from ORF.

(RX- 5.) I note that the term, "pending lawsuit" may include the prior whistleblower claim. I note that Mr. Marquand's name appears on the submission to OSHA in this case (CX- 2).[25] I also note that he was record counsel in Case No. 1999-CAA-25 and Case No. 2000-CAA-0009, Pickett's prior whistleblower case. In testimony, Yates did not deny that he was told about Pickett's 1992 whistleblower claims (TR, 65, 507). He said, however, that he could not remember the conversation (Id.).

Reviewing the entire record, I find that Pickett, like ***Robinson*** is, at a minimum, entitled to status as a whistleblower, whether he is considered to be a former or current TVA employee. Additionally, I find that Pickett remains a TVA employee, for purposes of whistleblower law, as long as his OWCP claim remains viable. I also find that, under the whistle blower acts that are involved this case, Pickett engaged in a protected activity, based on the 1999 complaint he had filed, and that the respondent was aware of the protected activity.

Vicarious Liability

I also accept that TVA is responsible for the acts of Yates. Generally there is a presumption that an agent is on the business of the employer and that the employer is responsible for the employee's acts. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). ***Burlington Industries, Inc. v. Ellerth***, 118 S.Ct. 2257 (June 26, 1998). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Taken from Title VII cases. Restatement (Second) of Agency § 219(2)(b)'s "aided in the agency relation" rule. In ***Faragher v. Boca Raton, Fla.***, 118 S.Ct. 2275 (June 26, 1998), also a Title VII case, the Court held that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.

In this case, Yates is a TVA employee, TVA clothed Yates with the authority to investigate Pickett, held his agency out to Green, and even designated Yates as its "management representative" at hearing. Moreover, TVA has not raised any affirmative defenses that would limit vicarious liability. *See also* ***NASA v. FLRA***, 527 U.S.229 (1999), *affirming* 120 F.3d 1208 (11th Cir. 1998), *affirming,* 50 F.L.R.A. 601 (NASA held legally responsible for actions of NASA IG directed against NASA employee

in retaliation for protected activity).

I also note that OIG employees are also TVA employees, subject to the same rules and regulations as all other TVA employees.

Qualified Privilege or Immunity

Pickett makes three primary whistleblower charges against TVA :

1. Agent Yates performed "retaliatory OIG investigations" and should not have personally obtained information from Oak Ridge Fabricators;

2. That Agent Yates' conduct, standing alone, was sufficiently improper to warrant relief under the employee protection provisions.

3. That Yates and TVA wrongfully withheld information from OSHA, which was the agency empowered to investigate the allegations.

TVA asserts that TVA's efforts, through Agent Yates, were privileged, and Pickett cannot sustain a claim concerning them. TVA argues that it has a duty to cooperate with OWCP on the investigation of FECA claims (TR, 363-64, 382) citing Department of Labor regulations that authorize Federal employers to investigate claims of injury and/or disability by employees and mandate that such information be supplied to OWCP. These regulations state in pertinent part that:

> (a) The employer is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means. Such evidence may be submitted at any time.
>
> (b) The employer may ascertain the events surrounding an injury and the extent of disability where it appears that an employee who alleges total disability may be performing other work, or may be engaging in activities which would indicate less than total disability.

According to TVA, this authority is in addition to that given in § 10.118(a) [20 C.F.R. § 10.118 (2001); see also TR, 382-83]. TVA implies that the duty to investigate provides the privilege.

The doctrine of qualified immunity shields government officials from liability, as well as from suit, as long as their official conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. ***Charvat v. Eastern Ohio Regional Wastewater Authority***, 246 F.3d 607 (6th Cir., 2001).

In the ordinary sense, "privilege" connotes a right or immunity granted as a peculiar benefit, advantage, or favor.[26] The Rules of Evidence reference the Constitution, statutory, common law and state law principles regarding privilege.[27] Although the Constitution addresses "privileges and immunities", it does not cover the present situation.[28] A review of the FECA, and regulations at 20 C.F.R. Parts 1-25, and the manual attached to it, does not disclose that an investigating officer is immune or privileged in any manner.[29] I note that TVA is a wholly-owned corporate agency and instrumentality of the United States, established by the Tennessee Valley Authority Act of 1933. TVA did not proffer regulations or written policies that would establish any privilege. The Clean Air Act and other whistleblower statutes do not expressly grant such a privilege or immunity for any class of employer. However, I accept that the government is entitled to a privilege (or immunity) that is "qualified" in that as long as an investigation is made for a legitimate purpose, it is qualifiedly privileged.

Immunity attaches to an official's function, rather than to the official's position. There is a historical

immunity for the court and for court officials, which includes lawyers, from civil liability for making, or for eliciting from witnesses, false or defamatory statements in judicial proceedings, at least so long as the statements were related to the proceedings. ***Imbler v. Pachtman***, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128, ***Yaselli v. Goff***, 12 F.2d 396, 401-402, summarily *aff'd*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395. Therefore, prosecutors are entitled to absolute immunity for their "conduct in 'initiating a prosecution and in presenting the State's case,' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.' " ***Burns v. Reed***, 500 U.S. 478, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991). However, the courts have been "quite sparing" in recognizing protections of absolute immunity, even for judges and court officers. ***Forrester v. White***, 484 U.S. 219, 224 (1988). By analogy to the civil rights laws, some officials perform "special functions" that are given qualified immunity from suit. "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." ***Burns,*** [478,] 486 [(1991)]; ***Antoine v. Byers & Anderson***, Inc., 508 U.S. 429, 432, and n.4. The Supreme Court has determined that most public officials are entitled only to a qualified immunity. ***Harlow v. Fitzgerald***, 457 U.S. 800, 807 (1982); ***Butz v. Economou***, 438 U.S. 478, 508 (1978). Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald***, 457 U.S., at 818. In most cases, qualified immunity is sufficient to "protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." ***Butz v. Economou***, *supra*, at 506. The analysis is based on the function to be performed. Yates was not performing a discretionary function. ***Butz*** involved immunity of an administrative law judge. If I were investigating, rather than hearing a case, I might well be acting in an administrative capacity, for which there is no absolute immunity. ***Antoine***, *supra*.[30]

Conversely, although Pickett made references to an assertion under the Privacy Act, that his FECA information is “confidential”, there is no evidence in this record that Pickett is protected by the Privacy Act. When a person files a claim in a public forum, those records are public information, unless otherwise privileged.

In a case involving criminal investigations, similar to this case***, Malley v. Briggs***, 475 U.S. 335, 344-45 (1986), the Supreme Court made it clear that, in assessing the appropriate level of official immunity, the function of a police officer applying for a warrant is not equivalent to the function of a prosecutor seeking an indictment, which may be absolutely privileged.[31]

TVA has not presented any argument or facts to show that Yates, *if he engaged in blacklisting*, is entitled to invocation of a privilege. Moreover, even if Yates may have had a qualified privilege, that does not give an employer an absolute right to blacklist or defame a TVA employee who is in a protected status. Most of the case law involving qualified immunity or privilege relates to defamation claims that are similar to blacklisting, in that they have some elements in common. But in a blacklisting case, the fact that a possibly blacklisted complainant was not refused employment or did not suffer any actual employment injury does *not* shield a respondent from liability. ***Leveille*** *supra*. In ***Leveille***, the blacklisting was simply marking an employee for avoidance in employment because she engaged in protected activity; the communication of an adverse recommendation simply was evidence of a decision to blacklist the employee. By analogy, Tennessee Courts have long held that “[d]efamatory words, falsely spoken or

written of a party, which prejudice such person in his profession, trade or business, are actionable in themselves, without proof of special damages." ***Bank v. Bowdre Bros***., 23 S.W. 131, 134 (1893); ***Mattson v. Albert***, 36 S.W. 1090 (1896); ***Williams v. McKee***, 38 S.W. 730 (1897); ***J.B. James Co. v. Bank***, 58 S.W. 261 (1900). The Court in ***Bowdre Bros***. further held that "[n]ext to imputations which tend to deprive a man of his life or liberty, or to exclude him from the comforts of society, may be ranked those which affect him in his office, profession or means of livelihood. ***Bowdre Bros***., 23 S.W. at 134 (citing Newell, ***Defamation, Slander and Libel*** p. 168). In cases where retaliatory intent may be an issue, some evidence may appear to be of little probative value until the evidence is considered as a whole." ***Seater v. Southern California Edison Co.***, *supra,* ***Timmons v. Mattingly Testing Services***, *supra*. In conclusion, when the words spoken have such a relation to the profession or occupation of the Complainant that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made. ***Townshend, Slander & Libel***, § 190, cited in ***Bodre Bros***.

Again, by analogy, Tennessee recognizes that a conditional privilege is recognized in defamation a context where an interest which defendant is seeking to vindicate or further is regarded as sufficiently important to justify some latitude for making mistakes. ***Pate v. Service Merchandise Co., Inc.***, 959 S.W.2d 569, (Tenn.App.,1996); ***Southern Ice Co. v. Black***, 189 S.W. 861 (Tenn.,1916) (a qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty to a person having a corresponding interest). To determine whether a conditional privilege exists, a court should look only to the occasion itself or communication and must determine as matter of law and general policy whether the occasion created some recognized duty or interest to make communication so as to make it privileged. ***Restatement (Second) of Torts*** *§§ 593-599.* [T]he critical test of the existence of the privilege is the circumstantial justification for the publication of the defamatory information. The critical elements of this test are the appropriateness of the occasion on which the defamatory information is published, the legitimacy of the interest thereby sought to be protected or promoted, and the pertinence of the receipt of that information by the recipient. ***Erickson v. Marsh & McLennan Co***., *supra*.

As to prospective employers who are checking job references or investigating a job history for former or current employee, an employer has a qualified privilege to divulge information regarding a former employee to a prospective employer. Information given to prospective employers create a qualified privilege which extends to an employer who responds in good faith to the specific inquiries of a third party regarding the qualifications of an employee. ***Snee v. Carter-Wallace, Inc***., 2001 WL 849734 E.D.Pa. Jul 02, 2001; ***Erickson v. Marsh & McLennan Co***., 117 N.J. 539, 562, 569 A.2d 793, 805 (N.J.1990). *See also* ***Fresh v. Cutter,*** *73 Md. 87, 20 A. 774 (1890);* ***Doane v. Grew,*** 220 Mass. 171, 107 N.E. 620 ***(1915); Carroll v. Owen,*** 178 Mich. 551, 146 N.W. 168 (1914); ***Moore v. St. Joseph Nursing Home, Inc***., 184 Mich.App. 766, 768, 459 N.W.2d 100 (1990). In blacklisting, however, the communication must be at least motivated in part, by protected activity status. ***Gaballa***, *supra*.

In most jurisdictions, a distinction is made regarding whether the investigatory information is given internally or to an outside party or entity. For example, under Michigan law, a supervisor was entitled to a qualified privilege for statements made to co-workers or to prospective employers. ***Gonyea v. Motor Parts Federal Credit Union***, 192 Mich.App. 74, 480 N.W.2d 297, 126 Lab.Cas. P 57,475, 7 IER Cases 539 Mich.App., Nov 19, 1991. An employer has the qualified privilege to defame an employee by making statements to other employees whose duties interest them in the subject matter. ***Smith v. Fergan***, 181 Mich.App. 594, 597, 450 N.W.2d 3 (1989). Even if some intra-corporate communications are conditionally privileged, in some states, a condition of that privilege is that the statements not be made with ill-will, are an issue of fact. ***Newman v. Legal Services Corp.***, 628 F.Supp. 535, 121 L.R.R.M. (BNA) 2962 D.D.C. Jan 27, 1986 See, e.g., ***Arsenault v. Allegheny Airlines, Inc***., 485 F.Supp. 1373, 1379 (D.Mass.), *aff'd without opinion*, 636 F.2d 1199 (1st Cir.1980), *cert. denied*, 454 U.S. 821, 102 S.Ct. 105, 70 L.Ed.2d 93 (1981). Many other state jurisdictions recognize a qualified privilege, that can be overcome if actual malice is proved.[32] Again in blacklisting, the communication must be at lease motivated *in part*, by protected activity status. ***Gaballa***, *supra*.

The facts relevant to the assertion of privilege show that on March 5, 2001, Nancy L. Branham, a Claims Officer in TVA's workers' compensation division ("WCD"), received a facsimile transmission from Gerald O. Halbur, an OWCP Claims Examiner in OWCP's Jacksonville, Florida, office (RX-3; TR388-92). The facsimile transmission consisted of a cover sheet and a copy of a letter OWCP had sent to Oak Ridge Fabricators on March 2, 2001, requesting information about Pickett's employment at Oak Ridge Fabricators (RX-3). OWCP had requested that Oak Ridge Fabricators provide information about the work performed by Pickett, the time period of his employment, the number of hours he worked per week, his pay rate, and the reasons for his leaving the job if he was no longer employed (RX-3 at 2). In the cover sheet, Mr. Halbur requested TVA's assistance in getting the information which OWCP had requested in its March 2, 2001, letter about Mr. Pickett's job from Oak Ridge Fabricators (TR388-90; RX-3 at 1). Mr. Halbur indicated that "[t]his office may be able to do a [wage earning capacity] off the info" (RX-3 at 1; TR388-90). An OWCP determination on wage earning capacity could have led to a reduction in Pickett's FECA benefits (TR389-90).

OWCP requests for information to TVA's WCD are not unusual (TR367). WCD receives written and oral requests for information from OWCP on a daily basis (TR367, 381). WCD responds to such OWCP requests since, as both Ms. Branham and her supervisor, WCD Manager Debra L. Youngblood, testified, TVA is required to respond to OWCP requests for information and to provide to OWCP whatever information may be pertinent to a claim for FECA benefits (TR363-64, 382). See 20 C.F.R. § 10.118 (2001).

WCD could not obtain the information requested by OWCP from any records within TVA since the only source for the information was Oak Ridge Fabricators, an outside business (TR, 361-63, 366). Nor did WCD have either the resources or the authority to try to obtain the information (TR, 380-81). Accordingly, Ms. Branham, after discussing the matter with Ms. Youngblood, called OIG Special Agent Craig A. Yates and asked for his help in getting the information requested by OWCP and sent Mr. Halbur's request on to Agent Yates (TR, 364-66, 393; RX-4). Her request to Agent Yates was not unusual—in such circumstances, she routinely requested the assistance of the OIG in collecting information (TR, 381-82, 397).

Yates routinely worked on workers' compensation matters for TVA's OIG (TR, 440-41). On March 19, 2001, Ms. Branham called him to request OIG assistance in obtaining the information requested by OWCP about Pickett's employment with Oak Ridge Fabricators (RX-4; TR, 396). Such requests from WCD to OIG were not rare (TR, 415-16, 445-48). Ms. Branham told Agent Yates that OWCP had not received any response to the request and had asked TVA for assistance in obtaining the information (TR, 397, 449). She followed up the telephone conversation with sending Agent Yates a copy of the OWCP request (TR, 396-98, 449; RX-3; RX-4).

At the time that Yates spoke to Ms. Branham and received a copy of the OWCP request, OIG did not have an open case involving Pickett (TR, 415-17, 442-45). Accordingly, Agent Yates discussed the request with his supervisor, C. Dale Hamilton, and obtained his approval to try to obtain the requested information (TR, 416-18, 449). Agent Yates did not immediately visit Oak Ridge Fabricators since he had to focus on his open cases, which had a higher priority (TR, 452). As Agent Yates testified, "I did set it aside till a time that I could—I could get to it" (id.).

On March 30, 2001, Yates went to Oak Ridge Fabricators (TR, 451-52). As previously noted, that business is located in Oliver Springs, Tennessee, a community some distance to the northwest of Knoxville. Yates did not call ahead (TR, 452). When he first arrived at Oak Ridge Fabricators shortly after 8:00 a.m., he was told by an individual in the main office area that he would need to speak to the owner of the company, Scott Green, who was not there at that time (TR, 452-53). Agent Yates left, worked on some other business he had in the area, and returned about 10:00 a.m. (TR, 453).

Yates asked for Mr. Green at the reception desk (TR, 453-55). The receptionist ushered him into a what he took to be a lunch or break room (TR, 455). The receptionist introduced him to Mr. Green and left the room (TR, 456-57). Both men were casually dressed (TR, 455-56). Agent Yates spoke to Mr. Green for less than half an hour and the whole tone of the conversation was casual (TR, 457). Mr. Green said that he had received the request for information from OWCP (TR, 43-47, 458). However, he explained that Pickett was very upset by the OWCP letter and told Mr. Green that he was presently involved in a lawsuit against TVA (TR, 458). Mr. Green decided not to respond to OWCP's letter because he did not want to get involved in a legal battle between Pickett and TVA (Id.). He added that he and Pickett were extremely good friends and that he did not want to get a friend in trouble (TR, 458, 460-61; see TR, 43).

TVA argues that TVA's actions were not only authorized, but required by these regulations. OWCP, not TVA, prompted the inquiry into complainant's recent employment (RX-3; TR, 383-92). Pickett had apparently notified OWCP that he had worked for some period of time at Oak Ridge Fabricators (RX-3 at 2; see also TR, 470). OWCP needed information about that employment "to verify entitlement to [FECA] compensation" (RX-3 at 2). The OWCP claims examiner asked that TVA "assist in getting information from [Oak Ridge Fabricators]" (RX-3 at 1). Ms. Branham of TVA's WCD referred OWCP's request to Agent Yates, since TVA OIG provides investigative support on FECA claims (TR, 365-66, 380-82). Agent Yates' visit to Oak Ridge Fabricators was thus authorized and not subject to review or suit.

Green and Oak Ridge Fabricators are both a prior employer as well as a prospective employer of Pickett. Therefore, I accept that TVA and Yates had a qualified privilege to investigate Pickett, based on his OWCP FECA claim.

TVA argues that the only reason Yates went to Oak Ridge Fabricators on March 30 was because OWCP had asked TVA for assistance in obtaining information about Pickett's admitted employment at Oak Ridge Fabricators (TR, 365-66, 380-92, 416-18, 448-50). It also offers that ***Billings v. TVA***, No. 91-ERA-12 (ARB June 26, 1996), is on point. In that case, the Complainant argued that an investigation for fraud and abuse were also evidence of blacklisting. The ALJ found that there is no authority to dispute FECA decisions under the ERA and Complainant failed to come forward with arguments to the contrary. The Complainant likewise failed to respond to ARB Orders establishing briefing schedules in these cases. Therefore, the privilege issue was not fully litigated in ***Billings***. I note that there was no discussion in ***Billings*** whether there may be a *qualified* privilege that can be lost when bad faith is shown. ***Charvat v. Eastern Ohio Regional Wastewater Authority***, *supra*. I also note that there was no allegation of a retaliatory independent action, such as the alleged derogatory remarks made to a former or prospective employer, as Green is here. This matter is discussed in full *infra*. Therefore, TVA's allegation that ***Billings*** creates an absolute privilege is not well founded on at least three bases.

Although I accept that Yates was qualifiedly privileged to perform an investigation, I do not accept that Yates or TVA is entitled to an absolute privilege.

Dual Motive

In this case, the Respondent argues that it was privileged to investigate the claim under the workers' compensation statute, and that all of the activity complained by Pickett is subject to an investigation initiated by OWCP.

A complainant must establish a *prima facie* case before dual motive analysis applies, ***Sluder v. Detroit Edison Co.***, 93-ERA-32 (Sec'y Apr. 13, 1995) (citing ***Price Waterhouse v. Hopkins***, 490 U.S. 228 (1989); ***Henrey v. Pullman Power Products, Corp***., 86-ERA-13 (Sec'y June 3, 1987). Under dual motive analysis, once the *prima facie* case is established, a respondent must establish both that it had a legitimate reason for the adverse action and that it would have taken the action for that reason alone.

The existence of a legitimate reason for the taking of adverse employment action against a complainant does not, by itself, carry a respondent's burden in a dual motive case. Rather, the record must establish that the respondent would have taken the action for the legitimate reason alone. See ***Martin v. The Department of the Army***, 93-SDW-1 (Sec'y July 13, 1995) (no evidence that respondent would have reassigned the complainant for the legitimate reason alone, such as evidence that the disciplinary rules mandated reassignment for the offense or that other employees who committed similar offenses had been reassigned). In dual motive cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated. ***Pogue v. United States Dept. of Labor***, 940 F2d 1287 (9th Cir. 1991); ***Mandreger v. The Detroit Edison Co.***, 88-ERA-17 (Sec'y Mar. 30, 1994).

"[W]here a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is not unnecessary to rely on a 'dual motive' analysis." ***Mitchell v. Link Trucking, Inc***., ARB 01-059, ALJ No. 2000-STA-39 (ARB Sept. 28, 2001).

Blacklisting must be at least motivated in part by protected activity status. ***Gaballa***, *supra*. In this decision, I discuss why I find that Pickett has proved that TVA knew (or should have known) that Yates had animus toward Pickett before Yates was sent to investigate this case. TVA knew that Pickett

has protected status on the basis that he had filed a whistleblower claim. As Pickett had made allegations about Yates in the prior whitleblower complaint, Yates had a motive to be hostile to Pickett. I also find that TVA has not shown by either a preponderance of the evidence or by clear and convincing proof that the investigation was based exclusively on the FECA case.

Once Yates began to provide information that is derogatory and or defamatory, he was no longer performing a privileged investigation. At that time, be engaged in blacklisting activity. TVA bears the risk that the influence of legal and illegal motives cannot be separated. ***Pogue v. United States Dept. of Labor***, *supra*; ***Mandreger v. The Detroit Edison Co.***, *supra*. It failed to present evidence that rebuts the dual motive doctrine

Evaluation of Relevant Evidence

Application of the Qualified Privilege

As I have stated above, I accept that there is a qualified privilege that extends to TVA and to Yates to investigate Pickett's claims. I have considered the testimony of Debra Youngblood and Nancy Branham, and, crediting their testimony, and accepting Mr. Hickman's testimony in part[33], find that the investigation initially was a response to a routine workers' compensation inquiry. See TR, 339, 388-396; RX-3. I also accept that the information requested by OWCP was privileged and extends to TVA and to Yates to obtain the information requested by OWCP (TR, 364-66, 393; RX-4).

However, before he made the visit to Oak Ridge Fabricators, Yates talked to his supervisor, Hamilton, and told him about the request from OWCP. "He came back to me the next day and said that he had talked to Brent Marquand. But I didn't personally speak to Brent myself." Mr. Marquand is an attorney with TVA (TR, 123). Marquand was the TVA attorney in Pickett's prior whistleblower case. And his name appears as the signator of the OSHA/ TVA response (CX 2).

Yates had authority and was privileged to go to Green's premises, display his badge, question other employees and to inquire about Pickett's lifestyle, about his finances, his work duties, threaten to use subpoena power and any thing else that is consistent with the duties of an IG investigator and may lead to relevant information about Pickett. I accept that these matters can be justified to be related to a valid investigation of the FECA case. Therefore, such matters that are pled by the complaint and by argument, such as "repeatedly" demanding to see Mr. Green's payroll, check and computer records; stating that OWCP had sent him there to investigate, claiming he was not there for TVA; and asking how much money Mr. Pickett made and what work he did are reasonably related to the investigation and are entitled to privilege.[34] ***Charvat v. Eastern Ohio Regional Wastewater Authority***, *supra*.

However, as to the words said about Pickett that may be evidence of blacklisting of Pickett by TVA, the issue revolves around the credibility of the witnesses, specifically Green and Yates. I had an opportunity to listen to the testimony of both witnesses and observe both of them. My findings of fact as to credibility entails my analysis of the testimony, but also an estimate of demeanor.

Green is both a former employer and a prospective employer, as well as a friend of Pickett. However, I do not find that he is a biased witness. I find that his presentation was more plausible than Yates'. Green's testimony, affidavit and notes and the implication of some of Yates' responses, are convincing, to a reasonable degree of probability, that Yates did more than investigate Pickett.

Although Green did inquire concerning the purpose of Yates' visit, I find that Green did not initiate

an inquiry from Yates that would justify Yates' derogatory remarks or create a privilege for him to do so. It is reasonable that there is a privilege for a former employer to provide information to a prospective employer. Had Green been a prospective employer who had called TVA to get a job reference concerning Pickett's fitness for a prospective job, the statements regarding Pickett's alleged malingering, and even the alleged adverse job recommendation, would probably have been privileged.[35]

However, the inquiry concerning Pickett came from OWCP, rather than from Green. Although he asked the same questions that are set forth by the OWCP letter, he furnished more information to Green about Pickett than he sought from Green.

I also accept that Green could tell from Yates' "tone" that he did not like Pickett (TR, 33); that Yates ridiculed Pickett; that Yates characterized Pickett as a malingerer (TR, 37-38), that Yates stated that although he had aches and pains, he was able to work (TR, 33); and that " He asked me how I'd feel if one of my workers was, you know, saying his back was hurting, wasn't working and he went to work for somebody else". TR, 38. I will discuss the ramifications of this below.

Although I also find that Yates gave Green information about the OWCP claim, and the amount received, and gave his version of the claim history, I find that this material is entitled to operation of the qualified privilege, since there is a complete nexus with the OWCP letter.

But Green was not just a prospective employer seeking information about Pickett. Rather Green was a potential witness against Pickett in both pending and prospective claims and litigation with TVA. Although Green may be a prospective employer, he also is a former employer, and a friend of Pickett. TVA argues that the only reason Yates went to Oak Ridge Fabricators on March 30 was because OWCP had asked TVA for assistance. That may be the only reason Yates was presented the detail, but the record shows that TVA knew or should have known that both Yates and Green were potential witnesses, in the FECA case and/or in the prior whistleblower case. TVA knew that Pickett has protected status on the basis that he had filed a whistleblower claim. As Pickett had made allegations about Yates in the prior whitleblower complaint[36], Yates had a motive to be hostile to Pickett.

I do not accept that Yates was fully candid at hearing. Although he was designated as the TVA representative, sat at counsel table, was consulted by counsel on several occasions, and listened to the discussions of counsel about the standard of proof, he testified that he did not know what a protected activity is (TR, 60). Although he had interviewed Pickett in the FECA case, had surveilled Pickett in the FECA case, and the record shows that he knew Pickett had prevailed in his FECA appeal, and the record shows that Pickett had brought a whistleblower claim before March 30, 2001, in which charges had been made that he had abused Pickett, Yates exhibited a convenient lack of memory for the details prior to March 30. On several occasions on the record, he did not respond to simple questions. For example, he testified that he was not privy to the "exact details" regarding the OWCP claim, that prompted the investigation (TR, 109). He didn't remember whether he had learned that Pickett had won his ECAB appeal in November, 2000 prior to the investigation. (TR, 73). It is reasonable that the FECA case (and ECAB appeal) was a reason why the OWCP letter had been sent and Yates had been asked to investigate.

Yates admittedly participated in a conference regarding Pickett's 1999 whistleblower complaint and shared information with trial counsel at that time (TR, 75). Pickett's allegations in the 1999 complaint centered around Yates' investigations, mostly between 1991 and 1993 (See CX-1, 5D and CX- 2, 1-14,

CX-10). Yates took the position throughout his testimony that, in essence, he did not know that charges of blacklisting made in the 1999 complaint were made against him personally. I find that untenable. *See* Case No. 1999-CAA-25, September 10, 1999; CX-1; CX-2.

Although he submitted a written report concerning the March 30 incident (CX 2, RX- 5), he denied knowledge of details contained in the report and knowledge of matters that had been discussed in testimony given in his presence.

Moreover, I consider many of the responses to be coy, especially when Yates, as the Respondent's representative, had attended a meeting about Pickett's 1999 whistleblower complaint, and sat through Green's testimony and heard the arguments of counsel regarding an alleged pattern of conduct.[37] Some of these instances involve matters that I have determined relate to matters that may be qualifiedly privileged. However, the responses reflect adversely on Yates' credibility. For example, after listening to Green's testimony, Yates was asked whether he thought that Green was lying. Yates did not deny that Green was, accurate in part:

> I don't know if he's lying. I didn't say that. I can't decide whether he misunderstood or whether he's telling the truth. I couldn't answer that.

TR, 69. Given the gravity of Green's testimony, and the accusations made against him, it is reasonable that if Green had been lying, Yates would have said so. Again, Yates' report denies any discussion about the details of the workers' compensation claim (RX-5, 2). In testimony, Yates was asked initially whether he had advised Green that Pickett had received $50,000.00 in back benefits after winning the ECAB case. He denied telling that to Green (TR, 78). In his report, he noted:

> Green advised he offered Pickett a job because he knew Pickett was having a difficult time and needed the money. This agent further explained to Green that Pickett would be eligible for reimbursement for a two year period that he (Pickett) did not receive disability benefits. Speaking in generalities, this agent also informed Green that it was not uncommon for someone on federal disability to receive in the excess of $50,000 reimbursement from OWCP after being reinstated from a two year layoff.

(RX-5). With respect to the complete denial set forth in the report, that there had been any discussion on this issue, the response in testimony is an example of the pregnant negative; either he discussed it or he did not. It is more plausible, to a reasonable degree of probability that there was such a discussion. By necessary implication, Yates' version in the report to his superiors is an apparent rationalization for having made the statement.

Although Yates alleged in his report that there was no reference to Pickett*s workers* compensation claim or personal family situation during the interview (RX-5, 2), the record shows that he did discuss this information. Yates was not consistent in his testimony on this subject. For example, whereas Green said that Picket was ridiculed for living at his parent's home, Yates initially denied discussing the subject (TR, 78). According to Green, Yates used his son as a basis of comparison to Pickett, to show that Pickett was in some way a parasite. Yates later admitted that he told Green he has a son who lives away from home part of the time (TR, 81). When asked again by Pickett's counsel about Pickett's living situation, Yates stated that he asked where Pickett was living, and that's when he found out that Pickett was living with his parents (TR, 466-467). This inconsistency makes Green's version of the story more plausible. Given the fact that there had been a complete denial initially, it is unreasonable

that there was no further discussion.

I accept that Green's allegation that there was a negative inference to be taken by the fact that Pickett lives at home and the comparison to his son to be substantiation for Green's characterization about Yates' "tone". I use the above examples to show that Yates' testimony can not be fully credited as to his report and statements regarding derogatory statements made about Pickett to Green. I do not infer that statements about workers' compensation were derogatory, an invasion of Pickett's privacy, or are evidence of whistleblowing, as I accept that the subject of workers' compensation is qualifiedly privileged.

On the other hand, the sole witness to impeach Green was Yates. Green's allegations regarding the defamatory statements are reflected in Pickett's complaint (ALJ-1). Yates' report (RX-5) was not responsive to the accusations that were made relative to allegations of malingering, which I consider to be is a crucial fact in contention in this case. Because I find Green's version of the story more logical that Yates', and find that Green's testimony is more consistent with the whole record, I credit Green's testimony.

Therefore, after a review of all of the evidence on this subject, I accept that Yates had animus for Pickett, as expressed by:

1. Yates exhibited a "tone" that he did not like Pickett and he ridiculed him;
2. Yates accused Pickett of malingering;
3. Yates inferred that Green should not hire Pickett in the future.

I do this based on my credibility findings set forth above. ***Reeves v. Sanderson Plumbing Products, Inc***., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105, (2000). I accept that these findings constitute a *prima facie* blacklisting case against TVA.

Statement of Robert Tyndall

Pickett submitted a statement from Senior Special Agent Robert E. Tyndall (Retired) (ALJ-31; TR, 15). TVA filed a (Second) Motion *in limine* (ALJ-27), which I held in abeyance until all of the evidence was adduced as Tyndall could have been called as a rebuttal witness. It requests that I not admit the statement into evidence.

Pickett alleges that this statement is un-rebutted and that I should accept the following *in toto*:

a. "It is my opinion that Agent Yates' conduct on March 30, 2001 was unprofessional, at a minimum because an Agent should not divulge confidential information to a witness."
b. "Under no circumstances should an investigator ever directly or indirectly betray any appearance of partiality on his part. The investigator's feelings are irrelevant and should not be shared with witnesses. Under no circumstances should an investigator lead or prompt the witness. This behavior prejudices or taints the witness against the person about whom questions are being asked, strongly implying bias by the investigator".
c. "Based upon the foregoing assumptions, it is my opinion that It strongly sounds like the investigator has a predetermined purpose. It strongly sounds like the investigator has made up his mind about the case prematurely."
d. "Based upon the foregoing assumptions, it is my opinion that this was not an "interview" solely for obtaining information. This appears to be an effort to assert the investigator's bias or for some other purpose."

e. "Based upon the foregoing assumptions, it is my opinion that such an "interview" would be so far out of bounds that it violates the very premise of common sense investigative techniques. It appears that the 'interview' was intimidating and designed to intimidate -- most witnesses would feel harassed if they did not agree with the premise of the investigator."

f. "Based upon the foregoing assumptions, it is my opinion that this manner of conducting an 'interview' could have a chilling effect on the interviewee. In my opinion, there is no proper law enforcement or business purpose for conducting an interview in this manner, leading to the inference that the true purpose may have been something else (e.g., blacklisting harassment and intimidation in violation of whistleblower laws)."

See Pickett's proposed Finding Number 6.

According to TVA, I should not admit the statement on the basis that there is no scientific foundation for the assertions.[38] TVA did not ***voir dire*** Tyndall, and does not attack his qualifications, but does assert that he his biased.[39]

I do not accept this. First, TVA did not object to the statement (ALJ-31) when it was offered. Second, in administrative proceedings, great latitude is given to admissibility of documents. See ***Richardson v. Perales***, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971).[40] Even under the FCRP, admissibility is favored. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Third, I do not accept that Tyndall has been proffered as an expert witness. Fourth, ***Daubert***, cited in the footnote, goes to the introduction of scientific evidence. A review of Tyndall's statement shows that his opinion goes to matters that do not require scientific analysis. Fifth, ***Daubert*** goes to determination before a jury. Under the Rules, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The purpose is to ensure that the jury is not exposed to "junk science". As the trier of fact, it would be impossible for me to exclude the proffered evidence, since I have to consider evidence that is sometimes otherwise objectionable. ***Richardson v. Perales***, *supra*.

Therefore, the statement is admitted. However, under the Administrative Procedure Act, I must consider the weight given to any evidence, and articulate a legitimate reason for assessing weight. Id.

With respect to the statement, "It is my opinion that Agent Yates' conduct on March 30, 2001 was unprofessional, at a minimum because an Agent should not divulge confidential information to a witness. " I have previously discussed situations when an employee's records are not confidential. When a person files a claim in a public forum, those records are public information, unless otherwise privileged. Pickett did not prove that any material was "confidential". I also recognize that the statement was not subject to cross-examination and that I may attribute less weight to it on that basis.[41] I also accept that Mr. Tyndall did not have all of the facts now in the record available to him when he rendered his opinions.

As to the assertion that "Under no circumstances should an investigator ever directly or indirectly betray any appearance of partiality on his part. The investigator's feelings are irrelevant and should not be shared with witnesses. Under no circumstances should an investigator lead or prompt the witness. This behavior prejudices or taints the witness against the person about whom questions are being asked, strongly implying bias by the investigator.", I have already determined that there is at times a qualified

privilege that may apply and therefore I do not accept this as a general proposition .

As to the assertion, "Based upon the foregoing assumptions, it is my opinion that it strongly sounds like the investigator has a predetermined purpose. It strongly sounds like the investigator has made up his mind about the case prematurely." I am the finder of fact and will make all determinations regarding credibility.

As to the assertion, "Based upon the foregoing assumptions, it is my opinion that this was not an "interview" solely for obtaining information. This appears to be an effort to assert the investigator's bias or for some other purpose." As above, the investigation was probably privileged.

As to the allegation, "Based upon the foregoing assumptions, it is my opinion that such an "interview" would be so far out of bounds that it violates the very premise of common sense investigative techniques. It appears that the 'interview' was intimidating and designed to intimidate -- most witnesses would feel harassed if they did not agree with the premise of the investigator." I reject this conclusion.

As to the assertion, "Based upon the foregoing assumptions, it is my opinion that this manner of conducting an 'interview' could have a chilling effect on the interviewee. In my opinion, there is no proper law enforcement or business purpose for conducting an interview in this manner, leading to the inference that the true purpose may have been something else (e.g., blacklisting harassment and intimidation in violation of whistleblower laws)." I have previously stated that I accept that TVA had a legitimate business purpose in performing an interview.

Therefore, I give little weight to the opinions asserted by Mr. Tyndall.

The OSHA Investigation

Pickett asserts that In 1933 Congress established that TVA has a duty to tell the truth and not deceive anyone anywhere at anytime about *anything*, under penalty of a felony statute in the Tennessee Valley Authority Act, to wit, 16 U.S.C. § 831t.[42] According to Pickett, TVA's presentation of *ex parte* information to OSHA, including misleading information, is a violation of public policy, and is entitled to no "privilege" under DOL whistleblower law. As stated *supra*, Pickett initially requested a remand to OSHA to perform an investigation. According to Pickett, TVA's own rules require that TVA should first have performed an internal investigation, preparing an "O2" form, prior to responding to the complaint:

> TVA maintained its innocence in a 198-page ex parte filing with OSHA, demanding that OSHA not investigate this case. (CX-2). Respondents claim that no 02 form was required because it was a "preliminary inquiry" is a pretext and "not worthy of belief." ..."If I feel like I didn't need to do a record of interview, then I wouldn't have to in that case" (T-57) is contradicted by the weight of the evidence.

Pickett's proposed finding Number 13. Pickett asserts that TVA "fixed" the OSHA investigation by not permitting him to participate, by submitting ex parte materials, and by fabricating evidence.

> Under 29 CFR §24.4 OSHA investigates (in part pertinent):
>
> (b) The Assistant Secretary shall, on a priority basis, investigate and gather data concerning such case, and as part of the investigation may enter and inspect such places and records (and make copies thereof), may question persons being proceeded against and other employees of the charged employer, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the law involved has been committed.

TVA asserts that after a complaint is filed with OSHA under the employee protection provisions of the environmental statues, OSHA conducts a preliminary inquiry. "This stage is investigative in nature, not adversarial. Accordingly, TVA acted appropriately when it did not send a copy of its submission to OSHA to Pickett's counsel." TVA Brief. TVA advises that:

> Counsel has unsuccessfully advanced this same argument to this tribunal, a fact he has not acknowledged in any of his written submissions. In ***Moore v. United States Dep't of Energy***, No. 1999-CAA-14 (ALJ June 4, 1999), *aff'd*, ARB No. 99-094 (July 31, 2001), Administrative Law Judge Larry W. Price rejected counsel's arguments and held that the Department of Labor's submission to OSHA was not an improper ex parte communication (at 4). Id.

The 1992 amendments to the ERA include a requirement that the complainant make a prima facie showing before OSHA may investigate, with a further requirement that even if the prima facie showing is made, the complaint will not be investigated if the employer can establish by clear and convincing evidence that it would have taken the adverse personnel action in the absence of the complainant's protected activity. See 42 U.S.C. §5851(b)(3)(A). TVA did not argue that Rule 24.7(b) bars a remand for completion of an investigation, and I also note that a remand to OSHA was ordered in Pickett's 1999 claim without objection. At that time, the ruling was that by its express terms, however, Rule 24.7 applies only to cases arising under the Energy Reorganization Act, and implementing Rule 24.5, not the statutes involved here. Case No. 1999-CAA-25, September 10, 1999.

Pickett has made several charges against Department of Labor entities, including OSHA. He alleges that OWCP conspired with TVA to blacklist Pickett. On September 7, Pickett filed a Request to Serve OWCP With a Notice of Hearing. As the Department of Labor is always a party in these matters, Department of Labor already had a Notice of Hearing, and if Pickett wanted to serve involve OWCP, he could call witnesses. Therefore, that request was denied.

According to the record, after the complaint was filed, Pickett did not submit further material to OSHA to attempt to prove that there was a *prima facie* showing. Apparently Pickett relies on OSHA to investigate whenever a charge is made. Pickett argues that TVA has not rebutted the prima facie case established by the affidavit Pickett filed. See Number 8, Pickett's Proposed Findings.

I have already discussed the fact that Pickett had alleged a pattern of conduct that he could not prove using the prior record and the statement of Tyndall. I have noted that OSHA, although a party to all actions under the whistleblower acts , and its entities, including OSHA and OWCP are not employers of the Complainant and are not subject to the allegations made against them.

A *prima facie* showing involves protected conduct, a protected activity, that the respondent was aware of the protected activity, and that the respondent took adverse action against the complainant. ***Deford v. Department of Labor***, *supra*. However, if the trier of fact determines that a respondent's adverse treatment of a complainant was motivated both by illegal and legitimate reasons, then the dual motive test becomes applicable. ***Zinn v. University of Missouri***, *supra*; ***Talbert v. Washington Public Power Supply System***, 93-ERA-35, *supra*, quoting ***Carroll v. U.S. Dep't of Labor***, No. 95-1729, 1996 U.S. App. LEXIS 3813 at *9 (8th Cir., 1996), quoting ***Stacks v. Southwestern Bell Yellow Pages, Inc.***, 996 F.2d 200, 202 (8th Cir. 1993). As the regulations require an OSHA investigation only when a *prima facie* case has been made, OSHA has the prerogative at that level to

determine whether the above was met. 29 CFR §24.4.

The APA, 5 U.S.C.A. § 557(d)(1) reads as follows:

(d) (1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law--

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

Department of Labor OALJ regulations do not permit ex parte communications.[43] However, the roles of administrative law judges and other Federal employees are quite different. An administrative law judge has a different employee status than the OSHA investigator or the Solicitor.[44] In ***Staskelunas v. Northeast Utilities Co.***, 98-ERA-8 @ n.5 (ARB May 4, 1998), the ARB indicated that OALJ's rules of practice should not be applied to events taking place prior to OALJ's obtaining jurisdiction over the matter.

I agree with Pickett, that as a matter of courtesy, that Mr. Fine or Mr. Marquand should have sent him a copy of the materials found in CX-2, the filing TVA made with OSHA in response to the complaint. Mr. Slavin's name and address appear on the document as record counsel for Pickett. TVA was engaged in at least two other active cases with Pickett at the time, and Mr. Slavin was record counsel

in both cases. A review of Tennessee ethics laws does not disclose that TVA failed to follow an express rule of professional conduct before OSHA.[45]

However, the OSHA investigation was not covered by the Administrative Procedure Act, and therefore, the *ex parte* prohibitions do not apply at that level.[46] 29 C.F.R. §24.4(c) provides that investigations shall be conducted in a manner which protects the confidentiality of any person other than the complainant who provides information on a confidential basis. See ***English v. General Electric Co.***, 85-ERA-2 (Sec'y Feb. 13, 1992).

On March 16, 2001, the U.S. Department of Labor Office of Inspector General issued a report, "Evaluation of OSHA's ERA and EPA Whistleblower Investigations," Report No. 2E-10-105-0001 (Mar. 16, 2001) [PDF document], which focused on the 30-day statutory time frame for conducting investigations. OIG found that OSHA was not meeting the 30-day time frame, and made a series of recommendations on how OSHA could reduce the amount of time it takes to conduct investigations. OSHA agreed with the OIG findings and recommendations, and implemented or presented plans for implementing the OIG recommendations. Therefore, permitting an adversarial procedure at this level would only delay the OSHA process further.

Pickett filed motions[47] to have me assert adverse inferences as a result of TVA's concealment of evidence based on the following:

A. The TVA Inspector General's failure to prepare any 02 report on the interview of Mr. Green;

B. Concealing this fact from DOL for six months, until five days before the date set for the hearing; and

C. Demanding and succeeding in halting any OSHA investigation, a coverup.

Pickett alleges that these acts are evidence of "spoilation", whereby evidence is wrongfully destroyed. I do not accept that evidence was destroyed in this case. Pickett further alleged that TVA obstructed and thwarted the OSHA investigation by filing an ex parte answer.

> TVA produced documents to OSHA that were never previously produced to Mr. Pickett, garbaging the record with ex pade hearsay from biased TVA sources. TVA*s actions before OSHA and its demands for illegal DOL OALJ orders (like summary judgment outside the mandatory 20 day time limit)[48] may themselves violate the whistleblower laws.

See Pickett's September 6 Motions (ALJ-13).

I find that an OSHSA investigation is a conditional right, and that OSHA has a right to determine whether a *prima facie* case exists as a condition precedent to an OSHA investigation. I would have found otherwise, and I may have accepted Pickett's argument that there had to be a response to the complaint, but I accept that OSHA does not have to require prohibitions to *ex parte* communications. Moreover, Pickett has not shown a valid reason to remand the case to OSHA. Further, this action was heard *de novo*, and the Department of Labor has the authority to remedy any matter within my jurisdiction.

TVA's Response to the Charges

OSHA was furnished a brief, ostensibly written by Brent Marquand, Esquire.[49] (CX-2, 1-5). I consider the allegations and arguments contained in the brief to be argument in the case in chief as well as

probative evidence. It was prepared *post litem motem*, most probably in preparation for litigation. However, I note that the argument does not address the issue regarding derogatory statements. I also note that the internal review process at TVA is also operated entirely *post litem motem*, but I accept that TVA failed to fully investigate this matter.

Hickman and Hamilton were Yates' superiors and provided statements on his behalf (RX-7 and RX-10). I accept that both Hickman and Hamilton were credible witnesses in that I accept their testimony at face value. However, I do not accept the conclusions that Yates' story is credible.

I note that TVA places the highest priority on charges that an OIG employee has been alleged to have exhibited professional misconduct (CX-9A, 2-5). I also note that each manager, such as Hickman and Hamilton, had the authority and discretion to correspond with outside agencies (Id, 2-1).

Hamilton testified that he accepted Yates at his word. (TR, 445). According to Hickman, who expressed TVA policy as the head of the IG department, the entire thrust of the internal inquiry revolved about the fact that the initial inquiry arose from a workers' compensation setting. From March 30 to April 12, when Hickman wrote his memo exonerating Yates' conduct, and by April 17, when the Marquand brief was sent to OSHA, TVA chose not to question Green about the Pickett complaint. Hickman stated:

> I can make a conclusion about Mr. Yates' investigative technique and what he did out there. The mere fact that he went to Oakridge Fabricators to follow up on information that came to the office's attention is not professional misconduct.

Tr, 348.

However, the record shows that Hickman and Hamilton had reason to know that Pickett had filed a first DOL whistleblower complaint in 1999. Had they read the complaint, and the 1999 file, he would have discovered that Pickett had claimed:

> 1. TVA knew of Mr. Pickett's environmental protected activity in raising concerns in the Widows Creek Steamplant workplace, including environment, safety and health concerns, including his concerns about overflowing scrubbers and resulting air and water pollution; (TR, 157-60, 164, 508).
>
> 2. TVA investigated Mr. Pickett's activities while he was attending Pellissippi State University as part of the rehabilitation process, designed to help find employment consistent with his disabilities (TR, 539).
>
> 3. TVA fired Mr. Pickett the month he was to graduate Pellissippi State, which was paid for by TVA as part of his employment rehabilitation through OWCP, stating it was because he was not available for work (TR, 169).
>
> 4. TVA never investigated or suggested investigating Mr. Pickett's environmental, safety, health and retaliation concerns (TR, 164, 543, 553).

See CX-2, RX-1.

Hickman also would have discovered that Yates had attended a meeting concerning the 1999 complaint (TR, 74). Hickman would have learned that the principal allegations in the 1999 Pickrett claim involved investigations conducted by Yates. *See* Case No. 1999-CAA-25, September 10, 1999. Hickman would have learned that the claim involved allegations that derogatory statements were spoken by Yates. He would have noted that Hamilton did not address the alleged derogatory statements in his memorandum. (TR, 447, RX-7). When asked why his report was not responsive to the complaint,

Hamilton related that, "I was not attempting to write a dissertation...." (TR, 447).

Although Hamilton admitted that Yates is a biased witness (TR, 432), Hamilton did not ask Yates to verify his statement and during the period from March 30 to April 12, when Hamilton wrote a letter exonerating Yates for any improper conduct during the March 20 interview, Yates was not placed under oath (TR, 433; RX-7).

The record shows that had Yates' derogatory remarks been attributed to him, they would violate OIG policy:

> A well planned interrogatory is the key to a successful interview. The SA needs to carefully formulate questions to be asked during the interview and be prepared for the person s responses. After properly identifying yourself and showing your credentials, the agent should try to put the person being interviewed at ease by asking background questions first before addressing more important questions. The questions should be simple, short, understandable, and direct and the agent should maintain absolute control of the interview and should lead or direct the discussion. Private and sensitive matters, such as financial matters, drinking or drug habits, and sexual matters are discussed only to the extent that they directly relate to the matter under investigation.

(CX 9, at 4-1, April 5, 2001).[50]

Yates testified that he had no training in whistleblower matters, including investigation of harassment and blacklisting for filing of USDOL complaints. (TR, 60-1, 79). He testified that he had never been instructed that he could not harass someone for filing a whistleblower complaint (TR, 61).

In essence, Hickman did not believe that investigators need training regarding what constitutes blacklisting remarks (TR, 325). He noted, "we do not typically investigate whistleblower concerns, unless they are nuclear concerns." (TR, 309). Had he read the charges made against Yates, he might have determined that Yates was not responsive to them in his report or that further investigation was needed.

Pickett argues that the attitude expressed by Yates' lack of training and insight into whistleblowing, and Hickman's attitude is "equivalent to ruling out legal protection for whistleblowers". All of this "seems inexplicable by anything but animus toward the class that it affects," making it a *per se* violation of Complainant's right to equal protection of the laws.

Although the IG's post March 30 conduct shows that TVA did not perform an internal investigation, and did not inquire of Green, place Yates under oath, did not even have an open file on Pickett, and Hickman did not even read the charges, I accept that TVA's activities in investigating Pickett's charges internally are privileged under the qualified privilege. ***Charvat v. Eastern Ohio Regional Wastewater Authority***, *supra*. At the time that the activities *post litem motem* were performed, Hickman and Hamilton were acting to investigate on behalf of TVA, and therefore, their function was entirely internal. **Newman v. Legal Services Corp**., *supra*, and ***Arsenault v. Allegheny Airlines, Inc.,*** *supra*.

Given this ruling, the issue regarding whether an O2 form is required in an OSHA investigation is moot.

Findings of Blacklisting

I previously determined the following:

1. Green could tell from Yates' "tone" that he did not like Pickett (TR, 33);

2. Yates accused Pickett of malingering (TR, 37-38);

3. Yates inferred that Green should not hire Pickett in the future. TR, 38.[51]

These findings show that Pickett has proven a *prima facie* case of blacklisting against TVA. 29 CFR §24.2(b). I accept Yates made derogatory remarks about Pickett that were intended to go to Pickett's prospective employment. When words spoken have such a relation to the profession or occupation that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made. ***Bowdre Bros.***, *supra*.

TVA knew Pickett had prevailed in his OWCP appeal and knew that that Pickett had brought a whistleblower claim before March 30, 2001. TVA knew that Pickett had made allegations about Yates in the prior whitleblower complaint[52], and that Yates knew or had reason to know this, giving Yates a motive to be hostile to Pickett. TVA knew that both Yates and Green were potential witnesses, in the FECA case and/or in the prior whistleblower case. I accept that Yates' conduct stemmed in part, from the fact that Pickett had filed the 1999 whistleblower claim and that Yates' conduct was in retsaliation for it. ***Gaballa***, *supra*.[53]

The fact that a possibly blacklisted complainant was not refused employment or did not suffer any actual employment injury does *not* shield a respondent from liability. ***Leveille*** *supra*. In ***Leveille***, the blacklisting was simply marking an employee for avoidance in employment because she engaged in protected activity; the communication of an adverse recommendation simply was evidence of a decision to blacklist the employee. Once I accept that Yates had made the statements about Pickett, the burden should shift to him to show that the statements are true or he could raise other affirmative defenses. However, TVA failed to produce any evidence that would counter or mitigate Yates' statements against Pickett. Again, these statements comprise the offense of blacklisting Pickett to his former and prospective employer, Green.

Once a prima facie case of discrimination been established, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for its actions ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and ***Texas Dept. of Community Affairs v. Burdine***, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

TVA failed to present any such defenses.

I find that Yates' statements were malicious to the extent that they exhibit actual malice.[54] I find that they exhibit a clear and convincing intent to blacklist Pickett.

I also find that there is a causal connection in that Pickett is in protected status as a prior whistleblower. ***Robinson v. Shell Oil Co.***, *supra*. On March 30, 2001, Yates knew that Pickett had filed a previous whistleblower claim (Stipulation by Mr. Fine, TR, 61). I also accept that Pickett told Yates that there were environment, safety and health violations at the Widows Creek Steamplant, where Pickett worked, including his a charge that scrubbers were overflowing, resulting in air and water pollution (TR, 157-60, 164). Again, I accept that Yates knew that Pickett had made charges against him in the prior whistleblower complaint.[55]

I accept that the primary impetus for the March 30 visit to Green was the FECA case, but I also

find that the referral to Yates was to a lesser degree motivated by the fact that there was also a 1999 whistleblower claim. As to Yates, however, I accept that a significant reason for the blacklisting was the fact that Pickett had been involved in the 1999 whistleblower complaint, which was pending at the time. The FECA investigation was an opportunity to retaliate against Pickett. *See* ***Gaballa v. Atlantic Group, Inc***., *supra*.

Although I accept that the Respondent was privileged to investigate the claim under the workers' compensation statute, I do not accept that TVA has proved it would have done so by clear and convincing evidence that it would have taken the same action the absence had Pickett not engaged in prior whistleblower activities. Once Yates began to provide information that is derogatory and or defamatory, he was no longer performing a privileged investigation. At that time, be engaged in blacklisting activity.

TVA bears the risk that the influence of legal and illegal motives cannot be separated. ***Pogue v. United States Dept. of Labor***, *supra*; ***Mandreger v. The Detroit Edison Co.***, *supra*. It failed to present evidence that rebuts the dual motive doctrine.

TVA also failed to present any evidence in support of mitigation of damages. I also find that TVA failed to properly investigate whether Yates had maligned Pickett. I find that Yates' supervisors perpetuated Yates' blacklisting activity and this is a factor for determining the nature of any remedy.

Remedies

A successful complainant under the whistleblower provisions of the environmental acts is entitled to affirmative action to abate the violation, including reinstatement to the former position, back pay, costs, and attorney fees. E.g., 42 U.S.C. §7622(b)(2)(B)(CAA). In addition, compensatory damages and punitive damages may be awarded under the environment acts. E.g., 42 U.S.C. §7622(b)(2)(B) (CAA).

Although a refusal of employment (or any actual employment injury) does *not* shield a respondent from liability. ***Leveille*** *supra*, I accept this is an important factor in fashioning a remedy in this case.

Pickett argues that Pickett's case should be considered to be "continuing". I do not accept that the events of March 30, 2001 constitute a continuing violation in the sense alleged by Pickett, as the pattern of conduct argued by Pickett has not been proved. In ***Malhotra v. Cotter & Co.***, 885 F.2d 1305, the term, "continuing", relates to a series of proved violations.

> What justifies treating a series of separate violations as a single continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory mistreatment.

This issue usually occurs in contexts involving statutes of limitations. I have determined that Pickett failed to show that there was any basis to reopen, revise or revisit prior cases. Pickett failed to prove that there are mistakes of fact or law, new and material evidence or any other basis to reopen or revise any of the prior actions.[56] Therefore, although I have rendered findings relative to Yates'otive that was developed prior to his visit to Green, and although I note that TVA knew or should have known that Yates had animus toward Pickett prior to that interview, I will limit the proposed remedy based on the findings that I have rendered relating solely to the March 30, 2001 incident. None of the allegations made about the prior record that Pickett maintains are "continuing" are pertinent as to TVA

liability. Despite the allegations relative to similar conduct the totality of the matters complained about are privileged activities, or relate to matters that are administratively final.

Reinstatement and Back Pay

Pickett requested reinstatement to a "suitable white collar TVA position within Mr. Pickett's physical limitations in a non-hostile working environment free of discrimination against employee protected speech, together with all back pay and benefits, including but not limited to all of the raises, sick, annual and official leave, promotions, benefits and retirement benefits that Mr. Pickett would have had by now (based upon the probability that Mr. Pickett would have been a TVA powerplant production manager or supervisor, as are a majority of the members of his class still employed by TVA)" .

However, Pickett failed to place into evidence any of the necessary evidence he would need to prove that he is entitled to any of the relief requested in this section. As to the request for reinstatement, I accept that had Pickett been fired for whistleblowing activity, he would be entitled to reinstatement. Once the Court determines that a violation has occurred, complainants are generally entitled under the whistleblower acts to reinstatement and back pay. 42 U.S.C. §7622(b)(2)(B). However, Pickett has not worked for TVA since he was injured in 1988, and he also has a companion FECA case that is ongoing and in which he alleges medical disability.[57] Moreover, Pickett's status as a TVA employee remains in dispute in the FECA litigation. Pickett also places conditions to reinstatement by invoking an assumption that Pickett would have been a TVA powerplant production manager or supervisor. Pickett has not advanced any theory or proffered facts which show that as a result of conduct performed March 30, 2001, Pickett is entitled to such an assumption. He also failed to place into evidence any evidence relating to a particular job to which Pickett may be qualified. He worked at TVA from 1985 until 1988, in the student generating plant training program (TR, 150-1). It is obvious that Pickett's demand is for a better position. Although Pickett testified that he now has a degree in environmental engineering, he did not show how that fact affects his present status and his claim for back pay. Pickett bears the burden of proof on this issue. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko], *supra*. If reinstatement means returned to the same job, Pickett would be returned to the intern position.

One expects that Pickett would have proffered information regarding his capacity to work, income, his pay history, and presented the income of employees who may stand in a similar position. See 42 U.S.C. §7622(b)(2)(B). He failed to present any calculations concerning his alleged average weekly wage and compensation rate, that are most probably part of his FECA claim. Green testified that Pickett was paid $7 an hour and only averaged about one or two days a week, earning only about $1000 for all of 2000 (TR, 461-463). That information is not useful in rendering a calculation of back pay in this case, as it does not go to work performed at TVA, and I accept that it does not reflect Pickett's wage capacity as of March 30, 2001.

The purpose of a back pay award is to make the employee whole, that is to restore the employee to the same position he would have been in if not discriminated against. See ***Blackburn v. Metric Constructors, Inc.,*** 86-ERA-4 (Sec'y Oct. 30, 1991), slip op. at 11. A complainant has the burden of establishing the amount that a respondent owes. ***Pillow v. Bechtel Construction, Inc***., 87-

ERA-35 (Sec'y July 19, 1993). A Complainant is entitled to receive the wages and benefits she would have received but for the illegal discrimination. Back pay includes not only salary loss, but also compensation for lost overtime, shift differentials, and fringe benefits such as sick pay, annual leave, and vacation pay. ***Crabtree v. Baptist Hosp. of Gadsden, Inc***., 749 F.2d 1501 (11th Cir.1985).

It is ironic that Pickett claims that he has been medically unable to work for the pendency of the FECA claim, which covers much of the time period he alleges that he should receive compensation as a whistleblower. The record does show that on March 2, 1989, TVA offered Pickett a job as a "Clerk SB-2" at a rate of pay of $5.95 per hour (CX-2, 29). However, the FECA case remained in active litigation and Pickett took the position that the job duties that were offered did not fit his physical functional capacity at that time (CX-2, 58-59, 63-64, 83). I note that Pickett resisted this position and prevailed in the ECAB appeal. A review of CX-1 and CX-2 shows that in the prior cases Pickett resisted reinstatement, whereas here he demands it. Moreover, I have determined that Pickett failed to prove that he has been the subject of blacklisting for the period prior to March 30, 2001, and therefore, the conditions precedent to full reinstatement to his 1988 status are not warranted by these facts. Therefore, Pickett failed to show entitlement to reinstatement at the terms he demands. I accept that as of March 30, 2001 TVA blacklisted Pickett, but Pickett failed to develop a basis for reinstatement in this record.

In the usual case, a complainant who has been discharged (or constructively discharged) is entitled to back pay from the date his employment ended until the tender of an offer of reinstatement, even if the offer is declined. ***West v. Systems Applications Int'l, Case*** No. 94-CAA-15, Sec. Dec. and Ord. Of Rem., Apr. 19, 1995, slip op. at 11-12. In this case, hypothetically, if Pickett is not physically able to be reinstated immediately, the proper cut-off for back pay is the date of final judgment because front pay begins at that point.

Back pay awards cover total earnings, including overtime, shift differentials, premium pay, health and pension benefits, bonuses, stock purchase options and other fringe benefits. Raises that an employee would have received during the backpay period will also be included in the calculation of the total amount. Title VII, the point of reference for the whistleblower remedies section, requires the deduction of all "interim earnings," i.e., the period between the unlawful treatment of the plaintiff and the date of the order. Although Title VII mandates that a back pay award must be reduced by the amount earned or "earnable with reasonable diligence," the award will not be reduced where the defendant offers the plaintiff a lower paying job in a lower classification. ***Whatley v. Skaggs Co.***, 707 F.2d 1129 (10th Cir.), cert. denied, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 314 (1983). Government benefits, such as social security, unemployment compensation, welfare benefits or disability income are not interim earnings that must be set off against back pay. ***Gaworski v. ITT Commercial Finance Corp***., 17 F.3d 1104 (8th Cir.1994). Pickett would have a duty to provide such information.

An employee usually has the burden of mitigating damages by seeking suitable employment. See, e.g., ***Parrish v. Immanuel Medical Center***, 92 F.3d 727, 735 (8th Cir. 1996) (under ADEA and Nebraska Fair Employment Practice Act). The respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment. West, id. at 12.

There is nothing in the record relating to job searches, specific vocational preparation or earning

capacity. Pickett has not proffered any wage or income information that will permit me to calculate the amount.

Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. Citing ***Nichols v. Bechtel Construction Inc.***, 87-ERA-44, slip op. at 10 (Sec'y Nov. 18, 1993), *aff'd sub nom.* ***Bechtel Construction Co. v. Sec'y of Labor***, 50 F.3d 926 (11th Cir. 1995); ***McCafferty v. Centerior Energy***, 96-ERA-6 (ARB Sept. 24, 1997). However, there is nothing in this record to establish a factual foundation for reinstatement and back pay.

Front Pay

Pickett also requests front pay. Reestablishment of the employment relationship is a usual component of the remedy in discrimination cases. ***McCuistion v. Tennessee Valley Authority***, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 23. Front pay is a judicially created equitable remedy used as a substitute for reinstatement where there exists "irreparable animosity between the parties," ***Blum v. Witco Chem. Corp***., 829 F.2d 367, 374 (3d Cir. 1987), and "a productive and amicable working relationship would be impossible." ***EEOC v. Prudential Federal Sav. and Loan Ass'n***, 763 F.2d 1166, 1172 (10th Cir.), cert. denied, 474 U.S. 946 (1985). See ***United States v. Burke***, 119 L.Ed. 2d 34, 45 n.9 (1992) (acknowledging that some courts have ordered front pay for Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible). Reinstatement is "the preferred remedy to cover the loss of future earnings." ***Feldman v. Philadelphia Housing Authority***, No. 93-1977, et al. (3d Cir. Dec. 22, 1994), 1994 U.S. App. LEXIS 36082. Front pay is used as a substitute when reinstatement is not possible for some reason. E.g., ***Michaud and Ass't Sec. v. BSP Transport, Inc.,*** ARB Case No. 97-113, ALJ Case No. 95-STA-29, Fin. Dec. and Ord., Oct. 9, 1997, slip op. at 6, reversed on other grounds sub nom. ***BSP Trans, Inc. v. United States Dep't of Labor***, 160 F.3d 38 (1st Cir. 1998) (reinstatement not possible because of complainant's depression) ; ***Doyle v. Hydro Nuclear Svcs***., Case No. 89-ERA-22, Sec. Fin. Dec. and Ord., slip op. at 7 (reinstatement not possible because of divestiture of business in which complainant had been employed).

In some instances front pay is used when the Complainant continues to work at his old job but receives an amount equivalent to the pay he would have earned but for the unlawful discrimination. ***James v. Stockham Valves & Fittings Co.***, 559 F.2d 310 (5th Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978).

Front pay would be appropriate for Pickett, as reinstatement is not an appropriate remedy in this case. Generally, to calculate front pay, I would estimate future lost wages by reviewing the plaintiff's current and anticipated salary and benefits and the time the plaintiff presumably would be without comparable work. The court will evaluate: (1) the availability of comparable employment opportunities for persons of the plaintiff's education and experience; (2) the plaintiff's age, life expectancy and health; (3) the likelihood of the plaintiff's termination for valid business reasons; and (4) evidence of the plaintiff's diligence in mitigating damages. ***Suggs v. ServiceMaster Educ. Food Management***, 72 F.3d 1228 (6th Cir.,1996).

But again, Pickett has not proffered any wage or income information that will permit me to calculate the amount of front pay.

Compensatory Damages

Pickett also requests compensatory damages. Compensatory damages may be awarded under the environmental acts for pain and suffering, mental anguish, embarrassment and humiliation caused by the discriminatory treatment. The whistleblower statutes permit compensatory damages for emotional pain and suffering, mental anguish, embarrassment and humiliation. See generally ***Nolan v. AC Express***, 92-STA-37 (Sec'y 1/17/95) (analogous provision of the STA); ***Deford v. Secretary of Labor***, *supra* (analogous provision of the ERA). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful discriminatory conduct. See ***Bigham v. Guaranteed Overnight Delivery***, 95-STA-37 (ALJ 5/8/96) (adopted by ARB 9/5/96);.

Pickett bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. ***Blackburn v. Metric Constructors, Inc.***, 86-ERA-4 (Sec'y 10/30/91); ***Bigham,*** *supra* at p. 14; ***Lederhaus v. Paschen***, 91-ERA-13 (Sec'y 10/26/92), at p. 7 (Citation Omitted).

Pickett testified that he is unemployed (TR, 150). He testified that when Green told him that he was interviewed by Yates he was "very upset." TR, 161. He that he was adversely affected by Yates conduct in the FECA case:

> He had came out to my house once before years ago. And he had randomly threw my name all around town. The man even went to my church. The man even knew what church I went to. I mean, I wouldn't even go to my church for years because the man even went to my church in 1992 when he come out. And I thought, you know, here we go again. Here, he's going to come out and start this again, make me look like some kind of drug lord or some kind of villain or you know, some kind of government swindler or something of that nature.

TR, 161.

Pickett offered no other testimony about the nature and extent of any emotional distress, a need for any medical attention, pain and suffering, mental anguish, embarrassment and humiliation. He offered no special damages.

Green testified that Yates' remarks were an attack on Pickett's character:

> (Green). Well I mean, Dave's my friend. I mean, I didn't like it. I took it personal. I was just trying to help David get a little bit of income. I mean, he made all of fifteen hundred and some dollars working for me. It wasn't nothing.
>
> Q (By Mr. Slavin) If you didn't know David, how would Mr. Yates' statements have made you feel about him as an Employer, sir?
>
> A I wouldn't hire him.
>
> ....
>
> Q Let me ask you to assume, sir, that you didn't know Mr. Pickett personally. And an agent with a badge came to your office asking the kind of questions that Mr. Yates did on March the 30th.
>
> A I mean, there's no way I would hire him again. If I didn't know him, there's no way. I mean, my shop worker, he asked to see his payroll records. I mean, you don't think that's going to be all over town? I mean, there's no way. Just to have to come over here and

do this, I mean, there's no way.

TR, 39.

Green testified, and I accept that the incident "Just tore him up." TR, 40.

Green also alleged that "everyone" in Oliver Springs Tennessee knew that Pickett had been investigated. Id.

I note that Pickett has, in his FECA case, alleged a pre-existing psychiatric condition. A respondent may be held liable for damages when its negligent or unlawful actions have aggravated a preexisting psychiatric condition. ***Dindo v. Grand Union Co***., 331 F.2d 138, 141 (2d Cir. 1964). A review of the documents contained in CX-1 and CX-2 show that Pickett is alleged to have a narcissistic personality disorder as of September 16, 1998.[58] Testing by Pickett's treating psychiatrist determined that Pickett is an extremely sensitive person (Id).

However, the only testimony as to the effect that the March 30, 2001 incident may have had on his mental state is the expression of Green that Pickett was "torn" by the incident and Pickett's testimony that socialization is affected by the incident.

The Board has found it appropriate to review similar cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in whistleblower cases.

Accordingly, I reviewed related cases to compare the awards given in similar fact patterns. I note the following:

- ***Gaballa v. Atlantic Group, Inc***., *supra*. Like Pickett, Gaballa had been blacklisted, and testified that he felt his career had been destroyed by the respondent's action. The Secretary reviewed the compensatory damages awards for mental and emotional suffering made in a number of cases, which ranged from $10,000 to $50,000, and awarded Gaballa $35,000. The Secretary reduced the ALJ's recommended compensatory damage award to $25,000.
- ***DeFord v. Sec. Of Labor,*** *supra*. DeFord alleged that his transfer was the result of deliberate discrimination by TVA against him due to his participation in the NRC inspection process. He stopped work on Sept. 11, 1980, and was hospitalized 10 days later for observation. DeFord testified that upon suffering the embarrassment and humiliation that accompanied his transfer, he developed chest pains, encountered difficulty in sleeping and began suffering from severe depression. He received compensatory damages in the amount of $50,000.
- ***McCuistion v. Tennessee Valley Authority***, 89-ERA-6 (Sec'y Nov. 13, 1991), slip op. at 21-22 ($10,000 award; complainant was blacklisted and fired; forfeited life, health and dental insurance; unable to find other employment; exacerbated preexisting hypertension and caused stomach problems; sleeping difficulty, exhaustion, depression and anxiety).
- ***Beliveau v. Naval Underseas Warfare Center***, 1997-SDW-1 and 4 (ALJ June 29, 2000), the ALJ recommended an award of $50,000 in compensatory damages for emotional distress. Complainant had presented expert testimony, but the ALJ found that it was of limited probative value. In setting the amount of the award, therefore, the ALJ

looked at cases in which amounts were awarded for emotional distress without expert evidence in support. He then set the amount at the high end of that range ($20,000 to $50,000) because, despite the limited weight given to the expert's opinion, it was more probative than a complainant's mere conjecture.

- ***Smith v. Esicorp, Inc.***, 1993-ERA-16 (ARB Aug. 27, 1998). The ALJ found Complainant to be a very credible witness in describing the impact of Respondent's harassment, and recommended an award of $100,000 in compensatory damages. The ARB faulted the ALJ, however, for not explaining how he arrived at the $100,000 figure, and noted that it is appropriate to consider the range of awards made in similar cases when awarding compensatory damages. The Board reduced the ALJ's recommendation of $100,000 in compensatory damages to $20,000.
- ***Doyle v. Hydro Nuclear Services***, 1989-ERA-22 (ARB Sept. 6, 1996) (wherein the Board affirmed the ALJ's recommendation of $40,000 compensatory damages);
- ***Bigham***, *supra* . The ARB awarded Bigham $20,000 for mental anguish resulting from discriminatory layoff (wherein the Board increased the ALJ's award of compensatory damages from $2,500 to $20,000 after reviewing the observations and accounts of complainant's emotional distress).
- ***Lederhaus v. Paschen***, 1991-ERA-13 (Sec'y Oct. 26, 1992) The Secretary awarded Lederhaus $10,000 for mental distress caused by discriminatory discharge where Lederhaus showed he was unemployed for five and one half months; foreclosure proceedings were initiated on his house; bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted. However, the Secretary reduced the compensatory award from a recommended amount of $20,000 to $10,000.
- ***Blackburn v. Metric Constructors, Inc***., 86- ERA-4 (Sec'y Aug. 16, 1993). The Secretary awarded Blackburn $5,000 for mental pain and suffering caused by discriminatory discharge where Blackburn became moody and depressed and became short tempered with his wife and children. The Secretary reduced the ALJ's recommended award of compensatory damages to $5,000.
- ***Van Der Meer v. Western Kentucky University*** , ARB No. 98132 (formerly 97-078) ALJ No. 1995-ERA-38 (Sec'y Apr. 20, 1998) where, like here, the complainant suffered little out-of-pocket loss: he lost no salary as a result of the leave of absence and there was no evidence of uncompensated medical costs. Other losses were non-quantifiable. The complainant was awarded, however, $40,000 in compensatory damages because the respondent took extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's failure to follow the conciliatory procedures contained in its handbook and complainant testified that he felt humiliated.
- **Michaud v. BSP Transport, Inc**., ARB Case No. 97-113, ALJ Case No. 95-STA-

29, ARB Dec. Oct. 9, 1997, slip op. at 9. The ARB awarded $75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist. Evidence also showed foreclosure on Michaud's home and loss of savings.

- ***Smith v. Littenberg***, Case No. 92-ERA-52, Sec'y Dec., Sept. 6, 1995, slip op. at 7. The Secretary affirmed the ALJ's recommendation of award of $10,000 for mental and emotional stress caused by discriminatory discharge where Smith supported his claim with evidence from a psychiatrist that he was "depressed, obsessing, ruminating and ha[d] post-traumatic problems." [59]

The Board has determined that I may also consider the level of compensatory damages awarded in employment discrimination cases brought outside the Labor Department's administrative law system. ***Doyle***, supra and ***Leveille***, supra. After a review of several cases that I determine are analogous to blacklisting and the current findings, I note the following:

- ***Noble v. University of Georgia,*** WL 1339745 (Ga. Jury, 2001). Plaintiff received a $20,000 verdict. A white female suffered financial loss and emotional distress when she was denied admission to the defendant university. The plaintiff contended that the defendant discriminated against her by adhering to a policy which gave preferential treatment to admitting blacks and other minorities and that it violated her civil rights. She further contended that she was forced to attend another university with a higher admission rate because of the defendant's discrimination procedures. The defendant denied liability. Another white male also suffered emotional distress in a similar incident with the defendant and received an award.

- ***Dale Edwards v. Icon Equipment Distributors, Inc. and Brian Crandall***, WL 1517978 (Ohio Jury, 2001). The Plaintiff received a verdict of $4,400. Plaintiff worked as a truck driver and laborer at Defendant Icon's Cleveland office from May 1997 until he was discharged in July of 1999. Prior to his discharge, plaintiff had been absent from work for one week. Defendant Crandall was the president and owner of Defendant Icon. Plaintiff alleged that: (1) he had requested and taken a one week leave of absence to reduce stress and high blood pressure which was evidenced by a note from his physician; (2) he was wrongfully discharged by defendants based upon the perception that he was disabled because of high blood pressure and stress; (3) his discharge was discriminatory and in violation of Ohio public policy; and (4) he suffered damages as a direct result of defendants' actions. Defendants contended that: (1) they were unaware of any claimed disability by plaintiff; (2) plaintiff had never asked for any accommodation for his claimed disabilities; and (3) plaintiff was discharged for legitimate, nondiscriminatory business reasons such as plaintiff's failure to comply with personnel policies and absenteeism.

- ***Mary Dixon-Richardson v. West, Acting Secratary, Department of Veterans Affairs and Cincinnati-Ft. Thomas Veterans Adminstration Medical Center*** WL 1689694 (.USDC, O, Ohio Jury, 2001). Verdict: $15,538. Breakdown: $15,000

compensatory damages and $538 back pay. Plaintiff was a long-time employee of Defendant Veteran's Administration Medical Center. She was employed as a medical records clerk. Plaintiff filed an EEOC charge against a co-worker on the grounds of sexual harassment. That claim was then settled. Plaintiff alleged that following the settlement, she was subjected to progressive discipline for a period of approximately two years which culminated in a five day suspension without pay. Plaintiff alleged that: (1) she received progressive discipline without grounds following her filing of the EEOC charge; (2) she was retaliated against by defendant; and (3) she suffered damages including back pay in the amount of $538 as a direct result of defendant's actions. Defendant contended that any disciplinary action taken against plaintiff was justified based on plaintiff's conduct including rudeness to patients.

- ***Kohn vs. County of Los Angeles,*** WL 1720226 (Orange County Superior Court, T.D.Cal., 2001). The verdict was for $175,000. A 70-year-old male applicant sued the defendant state school district claiming age discrimination in violation of state law. The plaintiff alleged that the defendant's failure to rehire him because of his age caused him emotional distress. The defendant denied the allegations and claimed that the plaintiff was not selected due to his lower evaluation scores than other applicants. The court rejected the age discrimination claim and awarded damages for emotional distress but also found that the defendant failed to stop the occurrence of discrimination.
- ***Harsh v. Kwait***, WL 910025 (Ohio Jury, 2001). Compensatory damages were $10,000. A female office manager sued the male defendant dentist claiming sex discrimination in violation of state law. The plaintiff alleged that she was subjected to inappropriate sexual jokes and physical touching by the defendant resulting in emotional distress to the plaintiff. The defendant denied the allegations.[60]

Pickett did not show that the incident has caused permanent psychiatric or psychological damage, aggravated or exacerbated the pre-existing condition, or has caused Pickett to spend out of pocket medical expenses. He did not show that he needed immediate medical treatment, or that he needs any medical treatment. He did not provide any insight into Pickett's ability to react to management and co-workers, maintain attention and concentration or perform his daily activities or work related activities. He did not reference me to the ***Diagnostic & Statistical Manual of Mental Disorders IV*** (APA 4th ed.1997) (hereinafter "DSM IV "), the standard work on mental disorders.[61]

On the other hand, I accept that the publication of animus to Green is sufficient to cause damage to Pickett's reputation. Both Green and Pickett allege that the publication is to the residents in Oliver Springs, because it is such a small town. They both assert that it also caused Pickett humiliation and anxiety. I accept that also.

TVA failed to present any evidence to rebut these positions and did not produce mitigation evidence as to damages.

In reviewing the factors used to establish compensatory damages, I note that when back pay, front pay and reinstatement are added factors, especially where there are out of pocket expenses as

"special damages", the awards are usually comparatively quite high. I did not include cases where there were significant "special damages" alleged. Courts have recognized that in cases awarding damages for emotional distress, the awards in discharge cases are generally higher than those involving demotions or instances of harassment. See ***Webb v. City of West Chester, Ill.,*** 813 F.2d 824, 836; ***McCuisition,*** *supra*. I also note that when expert testimony has been proffered as to the extent of pain and suffering, the awards are heightened. In cases such as ***Noble***, supra, financial loss was proved. Pickett does not relate the same extent of intensity and severity as described in ***Bigham***, *supra*. In ***Gaballa***, *supra*, the treating physician testified at length regarding Complainant's emotional problems caused by the negative information which emanated from his TAG supervisor. In ***McQuiston***, *supra*, the Complainant's blood pressure was 226/116 and his treating physician advised him to go home to avoid job related stress.

As matters similar to these factors appear in this record, the amounts of those awards must be discounted in part. I give full consideration to the limited intensity, the severity and duration of Pickett's distress and the recognize the effect any related publications may have on him.

Considering all of the factors involved, after a review of the record, I find and conclude that a compensatory damage award in the amount of five thousand dollars ($5,000.00) is warranted.

Although Pickett requests interest on all awards, interest is not awardable on compensatory damages. ***Blackburn v. Metric Constructors, Inc,*** *supra****; Smith v. Littenberg***, supra; ***Creekmore v. ABB Power Systems Energy Services, Inc***., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996).

Exemplary Damages

Pickett argues that TVA is a recidivist violator of pollution laws. He cites to published cases where the Department of Labor or the courts have found against them.[62] He argues that the record shows that TVA does not regularly investigate Clean Air Act complaints, and is cavalier in its attitude to whistleblowing:

> TVA AIGI Hickman said "we do not typically investigate whistleblower concerns, unless they are nuclear concerns." (T-309). This is equivalent to ruling out legal protection for whistleblowers. All of this "seems inexplicable by anything but animus toward the class that it affects," making it a per se violation of Complainant's right to equal protection of the laws. ***Romer v. Evans***, 116 S.Ct. 1620 (1996). The Respondent has denied Complainant and other whistleblowers basic human rights that are taken for granted by others:
>
> > These are protections taken for granted by most people either because they already have them or do not need them: these are protections against exclusion from an almost limitless numbers of transactions and endeavors that constitute ordinary civil life in a free society.
>
> Id. See also ***Yick Wo. V. Hopkins***, 118 U.S. 356 (1886)(San Francisco's discrimination against Chinese-owned laundries remedied by Supreme Court.) Discriminators can't always be relied upon to tell their true motives, for "clever [persons] can easily conceal their motivations." ***United States v. City of Black Jack***, 508 F.2d 1179, 1184-85 (8th Cir. 1974), cert. denied 422 U.S. 1084 (1975). The "clever" TVA OIG investigated only Mr. Pickett, not his concerns, demonstrating irrefragably what the motive of the "investigations" has always been: a

"witch hunt" or persecution of Mr. Pickett.

TVA did not address this issue in its brief.

The Supreme Court has held that employment discrimination not based on a disparate impact theory is, in fact, intentional discrimination: "The 1991 [Civil Rights] Act limits compensatory and punitive damages awards ... to cases of 'intentional discrimination'--that is, cases that do not rely on the 'disparate impact' theory of discrimination." ***Kolstad v. Am. Dental Ass'n,*** 527 U.S. 526, 534, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (citation omitted).

Punitive damages are discretionary awards. Factors in determining whether punitive damages should be awarded and in what amount include:

1. The egregious nature of the conduct,
2. Its duration and frequency,
3. The defendant's response after being informed of the discrimination, and
4. The financial status of the defendant.

Id. In ***Kolstad***, the Supreme Court rejected the contention that punitive damages are available only in cases of an employer's "egregious" conduct. Id. at 534, 119 S.Ct. 2118. But it held that, to be liable for punitive damages, the employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." Id. at 536, 119 S.Ct. 2118.

TVA knew Pickett had prevailed in his OWCP appeal and knew that that Pickett had brought a whistleblower claim before March 30, 2001. TVA knew that Pickett had made allegations about Yates in the prior whitleblower complaint[63], and that Yates knew or had reason to know this, giving Yates a motive to be hostile to Pickett. TVA knew that both Yates and Green were potential witnesses, in the FECA case and/or in the prior whistleblower case.

I find that Yates, in essence, intentionally degraded Pickett, cast aspersions on his honesty, discouraged Green from future employment relations with Pickett, and blacklisted him in so doing. I find that this is egregious.

I note that as to Pickett the duration and frequency of TVA environmental violations are not significant in this case. However, I note that Pickett is correct that TVA has a history of environmental violations. I do not consider this to be an important factor in fashioning a remedy in this case, as there is no direct connection to the type of violations exhibited and TVAs conduct in this case.

I agree that Hickman and Hamilton failed, in essence, to perform any investigation and "rubber stamped" Yates' conduct in this case. They were Yates' supervisors. Where in a company, like TVA, the inaction of even relatively low-level supervisors may be imputed for punitive damages to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment. ***Kolstad***, *supra*. I have determined that because the activity was performed internally, TVA is immune with respect to Pickett's proof of blacklisting. However, with respect to TVAs intent, I am free to recognize that Hickman and Hamilton acted with complete disregard for Pickett's rights as a whistleblower.

Although I was not proffered TVA's financial statement, I recognize that it is a Federal agency with significant assets.

TVA takes the position that it is immune from punitive damages in the absence of specific Congressional language, citing to ***Springer v. Bryant***, 897 F.2d 1085, 1089-90 (11th Cir. 1990);

Painter v. TVA, 476 F.2d 943, 944 (5th Cir. 1973).

This case was brought under the Clean Air Act, 42 U.S.C. 7622, (CAA); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9610, (CERCLA); the Solid Waste Disposal Act, 42 U.S.C. 6971, (SWD); the Safe Drinking Water Act, 42 U.S.C. 300j-9,(SDW); the Federal Water Pollution Control Act, 33 U.S.C. 1367,(FWPC); and the Toxic Substances Control Act, 15 U.S.C. 2622,(TSC).

The TSC explicitly provides for exemplary damages "where appropriate". 15 U.S.C. § 2622(2)(B)(IV). The Safe Drinking Water Act (SDW), 42 U.S.C. § 300j-9(i)(2)(B)(iv) sets forth the same language.

Even where punitive damages are not allowable absent express statutory authorization, they may promote the statute's intent. ***Smith v. Esicorp, Inc.***, 93-ERA-16 (Sec'y Mar. 13, 1996), the Administrative Review Board has stated that where the applicable Act does provide such relief, and where the requisite state of mind (intent and resolve actually to take action to effect harm) exists, the decision to award punitive damages involves a discretionary moral judgment, and if the purposes of the statute can be served without resort to punitive measures, the Board does not award exemplary damages. ***Jones v. EG&G Defense Materials, Inc***., 1995-CAA-3 (ARB Sept. 29, 1998). Mere indifference to the purposes of the environmental acts is not sufficient to constitute the requisite state of mind for an award of exemplary damages. Id.; citing ***Johnson v. Old Dominion Security***, 1986-CAA-3, 4 and 5 (Sec't May 29, 1991) (dealing with violations of the CAA and the TSC).

Like ***Johnson***, supra, this claim was brought concurrently, as the SDW and TSC directly apply here.

Both ***Painter***, *supra* and ***Springer v. Bryant***, involve the Alabama Wrongful Death Act. In both, the Eleventh Circuit held that: (1) Federal Employees Liability Reform and Tort Compensation Act created absolute immunity for federal employees committing common-law torts within scope of their employment, but (2) because Alabama wrongful death statute permitted only an award of punitive damages, the wrongful death claim against the TVA was barred by sovereign immunity absent an explicit congressional waiver of immunity. The Court reviewed TVA's sovereign immunity section, Section 9(a), which states:

> (a) Exlusiveness [Sic] of Remedy.--(1) An action against the Tennessee Valley Authority for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Tennessee Valley Authority while acting within the scope of this [sic] office or employment is exlusive [sic] of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising out of or relating to the same subject matter against the employee or his estate is precluded without regard to when the act or omission occurred[.]

The Court determined that sovereign immunity applied to give the Plaintiffs no remedy.

The current action is a Federal whistleblower claim, brought under several Federal statutes, not one of the tort claims enumerated in the TVA statute, brought under the Federal Tort Claim Act. The distinction between discrimination actions, such as under the whistleblower statutes, and a tort is illustrated in an income tax case, where the issue was whether TVA payments from a settlement under a

backpay claim under Title VII of the Civil Rights Act of 1964 constitutes "damages received ... on account of personal injuries" under 26 U.S.C. § 104(a)(2), which covers tort damages as income. The Supreme Court determined that Title VII does not redress a tort-like personal injury. ***U.S. v. Burke***, 504 U.S. 229, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992). The whistleblower acts are often equated to Title VII as they are statutory and are similar in intent and purpose. ***Martin v. The Dept. of the Army***, ARB No. 96-131, ALJ No. 1993-SDW-1 (ARB July 30, 1999); ***Berg v. La Crosse Cooler Co.***, 612 F.2d 1041 (7th Cir. 1980); ***Parker v. Baltimore & O.R. Co.***, 652 F.2d 1012, 1020 (D.C. Cir. 1981).[64]

Therefore, as the SDW and the TSC, which are actionable here, expressly authorize exemplary damages, and as violations of the TSC anbd SDW are not torts, I reject the argument that TVA is immune from exemplary damages.

In reviewing other decisions for guidance, I have discovered the following:

- ***Sayre v. Alyeska Pipeline Service Co***., 1997-TSC-6 (ALJ May 18, 1999). The ALJ recommended an award of $5,000 in punitive damages where he found that both Respondents intentionally discriminated against Complainant because she engaged in protected activity, and Complainant was harassed, lost her job, and suffered mental and emotional stress as a result. The ALJ moderated the recommended punitive damage award because he found that that the alleged statements concerning future discrimination were unclear at best, and because of the mitigating fact that Complainant was eventually rehired.
- ***Ruud v. Westinghouse Hanford Co.***, 1988-ERA-33 (ALJ Dec. 8, 1998). The ALJ recommended exemplary damages of $12,500, based on a comparison with other cases.
- ***Jones v. EG & G Defense Materials, Inc***.,1995-CAA-3 (ARB Sept. 29, 1998). Complainant sought $150,000 in exemplary damages; the ALJ awarded $1. The ARB found that no exemplary damage award was warranted, because “mere indifference” to the purposes of the environmental acts is not sufficient to constitute the requisite state of mind for an award of exemplary damages.
- ***Jenkins v. United States Environmental Protection Agency***, 92-CAA-6 (ALJ Dec. 14, 1992). The ALJ recommended imposition of exemplary damages of $10,000, citing 42 U.S.C. § 300j-9(i)(2)(B)(ii), and the Respondent's "flagrant disregard of [the Complainant's] rights." In Jenkins, the Complainant was a scientist who frequently communicated to Congress and other about the carcinogenic effect of Agent Orange, and who criticized a research report commissioned by Monsanto which purported to downplay the harmless effect of Agent Orange, much to the embarrassment of her employer, the Environmental Protection Agency (EPA). There was direct evidence that EPA reassigned the Complainant to a position ill suited to the Complainant's talents, and which left her with little to do -- in effect isolating her. There was also evidence that the Complainant's work was respected, albeit begrudgingly.
- ***Harsh V. Kwait***, *supra*. Earlier I noted that compensatory damages awarded were $10,000. A female office manager sued the male defendant dentist claiming sex

discrimination in violation of state law. The plaintiff alleged that she was subjected to inappropriate sexual jokes and physical touching by the defendant resulting in emotional distress to the plaintiff. The defendant denied the allegations. In addition, $15,000 in punitive damages were awarded.

- ***Rene Civitarese V. Paul Machniak, Jeanne Machniak and Lelli Printing, Ltd.***, WL 1271601 (Ohio, Jury, 2001). A verdict: of $268,000 was awarded as to all defendants; $250,000 in punitive damages and $18,000 in compensatory damages. Plaintiff worked for Defendant Lelli Printing from 1992 until her constructive discharge in April, 1995. Plaintiff alleged that Defendant General Manager Paul Machniak, her supervisor, sexually harassed her by making sexual suggestions, instructing her to dress in a sexually suggestive manner, degrading women in general, and ultimately forcing sexual intercourse and other sex acts. Plaintiff denied that the acts of sexual intercourse were ever welcomed. Shortly after plaintiff filed claim, she alleged defendants began shifting assets (fraudulent conveyance). That portion of plaintiff's claims was bifurcated before trial. Plaintiff alleged that: (1) she suffered sexual harassment at the workplace; (2) she was constructively discharged; and (3) she suffered emotional damages as a result. Defendants denied all claims at trial and Defendant Paul Machniak contended he did nothing wrong.
- ***Marie Thompson V. Pharmacy Corporation of America and Pharmerica Drugs***, WL 718464 (USDC, Ga., 2001). A verdict: of $85,000 was rendered; the breakdown: $10,000 compensatory damages and $75,000 punitive damages. Plaintiff, a black female, was hired by Defendant Pharmacy Corporation in 1987. For nine years she worked as an IV pharmacy technician. In 1998 she applied for a promotion to IV Reimbursement Coordinator and was denied the position. A white employee received the position which plaintiff sought. Defendant Pharmerica was the successor company to Defendant Pharmacy Corporation. Plaintiff alleged that: (1) the white employee who received the position was less qualified; (2) she was denied the promotion because of her race; and (3) defendant company's actions constituted racial discrimination in violation of 42 USC sec. 1981. Defendant contended that no racial discrimination occurred and that the position had been given to a qualified individual.

After a review of all of the above, I find that TVA's conduct far exceeds "mere indifference", and that exemplary damages lie against TVA. *See* ***Jones v. EG & G Defense Materials, Inc***., *supra*. I consider the actions against Pickett were egregious, and note that TVA failed to adequately respond after being informed of the discrimination. At the outset, TVA knew or should have known that Yates had both the motive to have animus against Pickett and they provided Yates an opportunity to engage in blacklisting activity. After the claim was filed TVA ratified Yates' conduct without investigating properly. The evidence shows that Yates was untrained in whistleblowing matters. Hickman and Hamilton testified, in essence, that TVA has no policy regarding the handling of whistleblowing complaints and has not investigated any. Therefore subsequent to March 30, 2001, TVA has not corrected its conduct.

I note in all of the cases cited for comparison that respondents/ defendants denied liability. I note that there is a relationship between the "special" and compensatory award and the punitive damage award in the cited cases. As the award for compensatory damages is relatively modest, I do not award punitive damages in an amount that would unfairly enrich Pickett or would cause TVA to pay a significant proportion of its net worth.

TVA should pay Pickett $10,000.00 in exemplary damages.

Other Requested Relief

Post hearing, Pickett made the following proposed findings for equitable relief:

1. Orders to Respondents to cease and desist violating employees' civil and constitutional rights to engage freely and without coercion in protected activity under whistleblower laws;

2. Injunctive relief and affirmative actions to prevent any further violations or discrimination against other employees and order posting of notices to all employees of the finding in this case in Inside TVA and on the Internet;

3. Orders that Respondents' managers conduct mandatory meetings of all of Respondents' employees during normal working hours of each shift to apologize for the hostile working environment, and that this meeting be shown live on any management television systems, to include broadband and close-circuit TV. Mr. Pickett requests that this apology explicitly describe and encourage employees to engage in protected activity when they see fit, without using extralegal hierarchical constructs, which contribute to the existing chilled atmosphere toward protected activity. For verification and emphasis, Mr. Pickett requests that the apology be videotaped and repeated on every television or broadband system during normal working hours over a period of one month, and that the videotaped apology be shown to all of Respondents' managers once each year and be shown during the orientation of each new, rehired or transferred employee;

4. Mandatory protected activity, sensitivity, science, law and ethics training and skill assessment for each of Respondents' employees and agents from the top down, on the fundamental rights of all employees to report concerns and be advised of their DOL whistleblower rights, and to have those rights respected, without fear, favor or reprisal, with full employee and contractor education about their right to be free from management reprisals for protected activity, including but not limited to reprisals undertaken in violation of the Energy Reorganization Act, FLRA, False Claims Act, the Water Pollution Control Act, Clean Air Act, CERCLA, RCRA, OSHA, STAA and other applicable or potentially applicable whistleblower laws;

5. An order that Respondents reprimand, terminate or discipline each and every other TVA management agent or other employee responsible for the discrimination, as appropriate;

6. An order by the Secretary of Labor against Respondents and their agents and contractors and successors to cease and desist from surveillance or giving the impression of surveillance;

7. An order for the TVA OIG to cease and desist contacting Mr. Pickett, Mr. Green and Oak Ridge Fabricators, other employers and organizations, including Mr. Pickett's church and community;

13[65]. Appointment of Court-selected monitors to assure continued compliance with the Court's orders, with assurance of access to workplaces to oversee compliance;

14. Purging of all derogatory information from any and all files regarding Mr. Pickett's engaging in protected activity, after full discovery of all such files during the course of this litigation and the OSHA remand for investigation.

See Pickett's Proposed Findings.

Based on my findings and other rulings, almost all of the requests for relief stated above are based on an underlying premise derived from a theory of a continuing violation. I have rejected that argument. Moreover, I reject any of the requested relief that is not based on my findings of fact. All of the relief that is appropriate relates to the incident that occurred on March 30, 2001 and that involved an episode of blacklisting activity.

OIG witness testimony shows that TVA does not have any training program in whistleblower matters and does not have specific policies on how to investigate them.

I agree that an order advising TVA not to commit infractions of the whistleblower acts is appropriate. I do recommend that TVA enter a formal apology to Pickett, with a pledge not to perform blacklisting activities in the future.

Attorney Fees and Costs

The environmental acts entitle a winning complainant to an award of "the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint." 42 U.S.C. §7622(b)(2)(B) (CAA). No petition is before me at this time.

RECOMMENDED ORDER

Accordingly, in view of the foregoing, and upon the entire record, I issue the following Recommended Order:

1. Tennessee Valley Authority ("TVA", Respondent herein) shall immediately pay Complainant Pickett $5,000.00 as compensatory damages for the emotional suffering and distress caused to him by the Respondent's actions herein.

2. TVA shall also pay to Complainant Pickett $10,000 in exemplary damages.

3. (a) Counsel for Complainant shall file a Petition for Fees and Costs within thirty (30) days after the filing of the Recommended Decision and Order for all legal services rendered with service on Counsel for Respondents. Such submission shall be on a line item basis and shall separately itemize the time billed for each service rendered and costs incurred. Each such item shall be separately numbered.

(b) Respondent may file objections, if any, to said application for fees and costs within fifteen (15) days of receipt, but all objections to said Counsel's petition shall be on a line item basis using Complainant's numbering system, and any item not objected to in such manner and within such time required shall be deemed acquiesced in by Respondent.

(c) Within fifteen (15) days after receipt of any such objections from Respondent, Counsel for Complainant may file a response thereto. Such submission shall be in the

form of a line item response. Any objections not responded to in such manner and within such time will be deemed acquiesced in by Counsel for Complainant.

4. Accordingly, in view of the foregoing Findings of Fact and Conclusions of Law and keeping in mind the egregious, disparate and discriminatory treatment of the Pickett by the TVA, I find and conclude that the Pickett is also entitled to the following relief and that such relief is reasonable and necessary to remedy the wrongs done to Complainant by Respondents through its agents, representatives and employees: The Respondent shall also provide a copy of this ORDER without comment, via first class mail, to each of the employees of OIG within fourteen (14) days of issuance of this ORDER.

5. TVA will provide an explanatory letter to be approved by Pickett setting forth all of the circumstances truthfully and accurately as to the events of March 30, 2001 and their aftermath and such letter shall be placed in Pickett's official personnel file.

A

Daniel F. Solomon
Administrative Law Judge

NOTICE: This Recommended Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. § 24.8 (2001).

Notes

1. See ***Pickett v. Tennessee Valley Authority***, 1999-CAA-25 and 2000-CAA-9 (consolidated cases), http://www.oalj.dol.gov/public/wblower/decsn/2000caa09a.htm.

2. Hereinafter "Yates".

3. Hereinafter "Green".

4. The procedure is set forth by 42 U.S.C.A. § 7622(b)(2)(A). Section 11(c) of the Occupational Safety and Health Act of 1970 authorizes OSHA to investigate employee complaints of employer discrimination against employees who are involved in safety and health activities protected under the Act. OSHA also is responsible for enforcing whistleblower protection under ten other laws.

5. See Administrative Law Judge exhibits "ALJ" 2, 3, 3A and 3B.

6. ***Pickett v. TVA***, 2001-ERA-00038.

7. Included are:

A. Pickett's August 31:

1. Emergency Motion to Order Disclosure of All *Ex Parte* Contacts with OSHA by Respondents.
2. Motion to Reconsider Order Denying Remand.

ALJ-6.

B. TVA's Motion for Continuance (ALJ-8). Pickett's Opposition Motion (ALJ- 8A).

C. Pickett's September 4:

1. Motion to Quash TVAs Notice of Deposition.
2. Emergency Motion to Order Disclosure of All Ex Parte Filings and Contacts With OSHA by Respondents.

ALJ-9.

C. Pickett's Motion to Quash Any TVA Non-Party Depositions. ALJ-10.

D. TVA Motion for Summary Decision. ALJ-11.

E. Pickett's September 6:

1. Motion to Strike Improper Motion for Summary Judgment.

2.Objection to TVA*s Misleading Arguments.

3.Motion to Draw Adverse Inferences Re: OSHA Obstruction.

4.Citation of Supplemental Authorities Re: Depositions.

5.Motion to Admonish Respondents Re: Witnesses.

ALJ- 13.

F. Pickett's September 7:

1. Request to serve OWCP with notice of hearing.
2. Request to serve supoenae duces tecum to each defendant.
3. Request to serve additional exhibits.
ALJ- 14.
G. Pickett's Acknowledgment of the Court's Second Speaking Order Re: Mr. Green's Rights. (ALJ-15A).
H. Pickett's September 10:
1. First Notice of Filing.
2. Motion for Protective Order Against TVA Misconduct.
ALJ-15B.
I. TVA's Response to Pickett's September 6 Submission, dated September 11 (ALJ-16).
J. TVA's Prehearing Submission dated September 11(ALJ-17).
K. TVA's Response to Pickett's September 10 Motion for a Protective Order, dated September 12 (ALJ-18).
L. TVA 's Opposition to Pickett's Motion for Permission to Supplement His Hearing Exhibits After September 10, dated September 12 (ALJ-19).
M. TVAs Supplement Prehearing Statement, dated September 12 (ALJ-20).
N. Pickett's Prehearing Statement (ALJ-21).
O. TVA's Motion in Limine. ALJ-22.
P. Pickett's Motion for Adverse Findings Against TVA for Refusal to Provide Documents Sought By Subpoenas And Motion to Compel TVA to Comply With Subpoenas, dated September 13.
Q. Pickett's Motion to Compel TVA to Obey Court's September 7 Order Regarding Electronic Filings, dated September 14 (ALJ-25).
R. Pickett's Errata, dated September 14 (ALJ 26). Filing of letter advising that there was no O2 Form filed by Yates.
S. TVA's September 14 filings:
1. Second Motion in Limine, and TVAs Response to Pickett's September 13 Motion Request is to exclude Tyndall's testimony.
2. Third Motion In Limine.
3. Motion to Quash Pickett's Subpoenas.
T. Pickett's Notice of Filing, containing the documents in R, above, dated September 14 (ALJ-28).
U. Pickett's September 16:
1. Motion for Adverse Inferences and Default Judgment.
2. Pickett's Response to TVAs September 14 Motion (which probably means the Second Motion in Limine).
ALJ-29-ALJ-31.
V. Pickett's September 16 Motion for Adverse Inferences and Default Judgment (ALJ-31).

8. RX-3, RX-5, RX-6, RX-7, RX-8, and RX10 were admitted into evidence. RX-1, RX-2, RX-4 and RX-9 were identified but were not formally admitted into the record at hearing. Note that all of these exhibits are part of ALJ-17, TVAs Prehearing Submission, which was admitted into evidence, without objection and which incorporates the documents as if set forth fully at length. RX-1 is the complaint in this case, which is also marked as ALJ-1. RX-2 is the complaint in the prior case, which hereby is made a part of this record. RX-4 is a copy of a FAX dated March 5, which is also at CX-2, 160, and which had been admitted into evidence.

9. "TVA pays top executives $5.5 million in bonuses," Jennifer Lawson, ***Knoxville News-Sentinel***, December 29, 2001.

10. On January 8, Pickett filed a response alleging, "TVA does not deny the fact of TVA's record power sales and the fact of TVA's management bonuses exceeding the federal pay cap." TVA was not asked to respond to this issue in the case in chief, and therefore the news article is also not impeachment evidence.

11. Although OWCP is not a party to the case, Pickett moved to draw adverse inferences against the Office of Workers Compensation Programs (OWCP),

> as OWCP failed to attend the trial, failing to produce Mr. Halbur (who was listed by both Mr. Pickett and TVA as a witness and was part of TVA's pretext). Both OWCP and OSHA are advised by the same DOL Solicitor's Office. First OSHA covered up for TVA and OWCP. Then OWCP refused to cooperate with the Office of Administrative Law Judges. OWCP's empty eleventh-hour filing does not let OWCP off the hook. Nor is it good legal practice for a DOL Solicitor's Office manager to ignore Orders from an Administrative Law Judge or refuse to attend trial. Like the Respondents TVA and TVA OIG, Respondent OWCP waived its right to put on witnesses or evidence in its defense. The Court should so hold in the RD&O.

Pickett's Brief. OWCP is not a party, although Department of Labor is always a party. I discussed the reasons why I determine that there is a qualified privilege for investigations by OWCP, infra.

12. In that case, Pickett named as respondents the TVA Inspector General and the former manager of the TVA power plant where he had been employed. The ALJ dismissed them from that proceeding, since they were not his "employers." ***Pickett v. TVA***, at 5-6. ***Stevenson*** shows that the Secretary of Labor has held that individuals are not covered "persons" under the environmental whistleblower provisions unless they are also employers within the meaning of the applicable statute. See, ***Stephenson v. NASA*** , ***supra***. [Pickett] argues, however, that the Administrative Review Board (ARB) should revisit this holding in light of the grave facts of this case.

In ***Stephenson***, complainant contended that the TSCA and CAA employee protection provisions contemplated complaints against "person[s]." The secretary noted, however, that while the provisions reference "person[s]" in the procedural subsections (b) - (e), the substantive prohibition contained in subsection (a) refers to "employer[s]." Although the TSCA defined the term "person" as "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee

thereof" for purposes of the CAA. 42 U.S.C. §§ 7602(e), the secretary determined;

> The plain language of these employee protection provisions suggests that they were intended to apply to persons who are employers. That classification does not include the employees named here as respondents. Any other construction would require a clearer statement of intent than appears in the statutes at issue. For example, in a related area, courts have held corporate officers jointly and severally liable for unpaid wages under the Fair Labor Standards Act (FLSA) where the "economic reality" indicates sufficient control over the employment relationship. See ***Dole v. Elliott Travel & Tours, Inc***., 942 F.2d 962, 965 (6th Cir. 1991) and cases cited therein. This result follows from the FLSA definition of the term "employer" which "includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. §§ 203(d) (1988). Similarly, under the Mine Act, corporate "director[s], officer[s], and agent[s]" may be held liable for civil penalties under certain circumstances pursuant to explicit statutory directive. 30 U.S.C. §§ 820(c) (1988).

11. Those benefits have been terminated again. See, e.g., Pickett's Brief at 4.

14. Note that Pickett called Yates as his first witness as an adverse witness as if on cross examination. Therefore, the prior record could be used to impeach Yates.

15. 29 CFR § 18.48 Records in other proceedings.
In case any portion of the record in any other proceeding or civil or criminal action is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless the administrative law judge directs otherwise.

16. I determined that much of the evidence seen in a *in camera* proceeding on privileged documents would be a waste of judicial economy. 29 CFR § 18.403 Exclusion of relevant evidence on grounds of confusion or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of issues, or misleading the judge as trier of fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

17. "He [Green] volunteered information, said he [Pickett] drove a truck occasionally. I asked what kind of truck to make sure it wasn't a great, you know, great big, large truck that was hauling, you know, heavy material. He said it was just a regular truck to pick up machine parts around the Oakridge/Knoxville area, answer the telephone. I think he actually said it was not like regular work, is the way he explained it to me."

18. Yates said, "Mr. Pickett has not been harmed in any way. He received a check from us for over fifty thousand dollars. He has not been harmed." And I said, "well that's, you know, none of my business." I said, you know, "I don't want to get into that." TR, 32.

19. He also said, “You know, he had a son. And when he told him -- when he moved out, he paid his own way. And he couldn't understand why somebody that old lived at home. I said well, he didn't really have any money.” (TR, 40).

20. http://www.dictionary.com/cgi-bin/dict.pl?term=blacklisting

21. Whistleblower provisions do not protect workers from unreasonable or arbitrary actions on the part of an employer -- rather, they only protect workers from actions taken in retaliation for engaging in activities protected by the ERA. ***Collins v. Florida Power Corp***., 91-ERA-47 and 49 (Sec'y May 15, 1995). Whistleblowing is not directly concerned with safety standards, only the deviation from or the flouting of them. ***Norris v. Lumbermen's Mut. Casualty Co.***, 881 F2d 1144 (1st Cir. 1989). The federal "whistleblower" statutes promote enforcement of environmental laws by protecting employees who aid a government enforcement agency. ***Willy v. Coastal Corp***., 855 F.2d 1160 (5th Cir. 1988).

22. 42 U.S.C.A. § 7622 United States Code Annotated Title 42. The Public Health and Welfare Chapter 85--air Pollution Prevention and Control Subchapter Iii--general Provisions § 7622. Employee protection.

23. By analogy to Title VII cases, an employer is prohibited from retaliating against an employee who has “opposed” any practice by the employer made unlawful under Title VII; and prohibits an employer from retaliating against an employee who has “participated” in any manner in an investigationo under Title VII. To establish a claim under either the “Opposition” or “Participation” Clause, Plaintiff must meet show that: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to Defendants: (3) Defendants thereafter took an adverse employment action against Plaintiff, or Plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. ***Johnson,*** 215 F.3d at 578; see ***Morris,*** 201 F.3d at 792 (citing ***Canitia v. Yellow Freight Sys., Inc.,*** 903 F.2d 1064, 1066 (6th Cir. 1990). If Plaintiff establishes a prima facie case under either clause, then the burden shifts to Defendants to articulate a legitimate, nondiscriminatory reason for Plaintiff’s discharge. ***Id.*** (citing ***McDonnell Douglass,*** 411 U.S. at 802, 93 S.Ct. 1817). Plaintiff must then demonstrate that the proffered reason was not the true reason for the employment action, i.e., that the reason was a mere pretext for discrimination. ***Id.*** at 578-79.

22. TVA advises that the matter has been re-litigated.

25. Although Mr. Fine admitted at hearing that he initialed the letter to OSHA on Mr. Marquand’s behalf.

26. ***Miriam Webster’s Collegiate Dictionary***, http://www.m-w.com/.

27. Privileges: 29CFR § 18.501 General rule.
Except as otherwise required by the Constitution of the United States, or provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority, or

pursuant to executive order, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

28. Const Art. IV § 2, cl. 1: Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

29. In some jurisdictions, such as in California, a qualified privilege to perform investigations in a workers' compensation venue is established by statute. Under California law, a statement is privileged if it involves a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information. ***Maynard v. City of San Jose***, 37 F.3d 1396, 66 Fair Empl.Prac.Cas. (BNA) 123 9th Cir.(Cal.) Oct 13, 1994.

No similar statutory privilege exists with respect to TVA.

30. In the case of whether the court reporter was entitled to a qualified privilege, were a common-law judge to perform a reporter's function, she might well be acting in an administrative capacity, for which there is no absolute immunity. Id.

31. "We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. Further- more, ... the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction.... Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process. Id." In ***Antoine***, a court reporter was found not absolutely immune from damages liability for failing to produce a transcript of a federal criminal trial. Respondents bear the burden of establishing the justification for the absolute immunity they claim, which depends on the immunity historically accorded officials like them at common law and the interests behind it,

32. A conditional privilege can be lost if it is abused because of the publisher's lack of belief or reasonable grounds for belief in the truth of the defamatory matter. ***Schafroth v. Baker***, 276 Or. 39, 45, 553 P.2d 1046 (1976); ***Carroll v. Bayerische Landesbank***, 150 F.Supp.2d 531(S.D.N.Y., 2001) ; ***Taggart v. Drake Univ.***, 549 N.W.2d 796, 803 (Iowa 1996); ***Haywood v. Lucent Technologies, Inc.***, 2001 WL 1355282 (N.D.Ill.E.Div.,2001)*;**Rice v. Rose & Atkinson*, 2001 WL 1589626 (S.D.W.Va.,2001). In ***Snee v. Carter-Wallace, Inc.***, 2001 WL 849734, (EDPa., Jul 02, 2001), Snee claimed that Carter-Wallace defamed him when it repeated false and misleading statements made by two co-workers to other Carter-Wallace employees and prospective employers,

the court found: "a qualified privilege extends to an employer who responds in good faith to the specific inquiries of a third party regarding the qualifications of an employee". After reviewing the facts, applying the concept in a defamation setting, the court determied that Snee failed to demonstrate that the defendant abused the qualified privilege with respect to any of the categories of defamatory statements by acting in reckless disregard of the statements' truth or falsity. Under New Jersey law, a plaintiff must allege sufficient facts indicative of "excessive publication" to defeat the operation of this privilege. ***Schwartz v. Leasametric, Inc.,*** 224 N.J.Super. 21, 539 A.2d 744,N.J.Super.A.D. Mar 23, 1988***; Dairy Stores, Inc. v. Sentinel Pub. Co., Inc***., 191 N.J.Super. 202, 207, 465 A.2d 953 (Law Div.1983), *aff'd o.b.* 198 N.J.Super. 19, 486 A.2d 344 (App.Div.1985), *aff'd* 104 N.J. 125, 516 A.2d 220 (1986).

33. When he testified that Yates' involvement was initiated by a workers' compensation inquiry.

34. TVA did not raise whether Yates' mission was based on privileged "advice from counsel". In any event, I do not accept that there is such a defense, especially when the investigation goes beyond the ostensible purpose of the mission.

35. ***Fresh v. Cutter***, 73 Md. 87, 20 A. 774 (1890); ***Doane v. Grew***, 220 Mass. 171, 107 N.E. 620 (1915); ***Carroll v. Owen***, 178 Mich. 551, 146 N.W. 168 (1914); ***Snee v. Carter-Wallace, Inc***., *supra*; ***Erickson v. Marsh & McLennan Co***., *supra*.

36. *See* Case No. 1999-CAA-25, September 10, 1999; CX-1, CX-2.

37. Yates used objections as an occasion to assert that his memory was faulty. For example, see TR, 62-65. As the TVA representative, Yates was privy to the entire argument relating to this issue prior to giving testimony. He had an opportunity to refresh his memory as he listened to the proceedings, if not in 1992, in 1999. At that time, he attended a meeting regarding Pickett's 1999 complaint and furnished information about Pickett to lawyers handling that claim.

38. "Tyndall's testimony does not meet the ***Daubert/Kumho*** standards. By his own admission, Tyndall's "methodology" consisted solely of assuming the truth of the matters asserted in Pickett's complaint (Tyndall Decl. ¶ 2). Based on his declaration, it is clear he made no independent investigation of the facts and relied solely on what he was told either by Pickett or Pickett's counsel. There is no indication that he questioned Mr. Green, the only other individual who was a participant in the meeting at Oak Ridge Fabricators on March 30, 2001. Instead, his "expert" analysis appears to have consisted of nothing more than reading the complaint.

"In addition, Tyndall claims that he has not seen any records concerning Agent Yates' "interviews" (Tyndall Decl. ¶ 3). It is undisputed, however, that TVA sent a copy of Agent Yates' April 9, 2001, memorandum (RX-5) describing his conversation with Mr. Green and his later telephone conversation with Pickett to Pickett's counsel via facsimile on September 11 (TVA respondents' prehearing submission at 7). Tyndall's declaration was not executed until September 12 (Tyndall Decl.

at 3). Either Tyndall was not provided with this report or he simply refused to consider it. Tyndall produced nothing to warrant the admission of his testimony as an expert. He did not consider the evidence available to him, made no investigation of the facts, and based his "opinion" on nothing more than Pickett's self-serving hearsay statements. Accordingly, his opinion is inherently unreliable and thus inadmissible under the ***Daubert/Kumho Tire*** standard.

39. Tyndall*s declaration also evidences an extreme bias against employers. In the first instance, he is a former client of Pickett*s counsel (see ***Tyndall v. EPA***, 93-CAA-6, 95-CAA-5, 96-CAA-2 (ALT Sept. 17, 1996) and therefore should be seen as beholden to counsel and willing to say anything he believed would be of use to counsel. He further proclaims that he "was the prevailing plaintiff in a DOL environmental whistleblower case and know (sic) first-hand the extent to which federal employers will go to violate whistleblower rights" (Tyndall Decl. ¶ 10). This bias is also evident concerning TVA specifically. ALJ-27.

40. See Michael Graham, "Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach", 1991 U.Ill.L.Rev. 353 and Richard Pierce, ***Use of the Federal Rules of Evidence in Federal Agency Adjudications***, 39 Admin.L.Rev. 1 (1987). "Today, it is well accepted in federal courts that "relevant evidence not admissible in court, including hearsay, is admissible at an administrative hearing." **Tyra v. Secretary of HHS**, 896 F.2d 1024, 1030 (6th Cir.1990) cited in Charles H. Koch, Jr., ***Administrative Law And Practice Updated***, 2001-2002 Pocket Part . "That is to say that an agency may act arbitrarily if it fails to admit or to consider the reliable hearsay. This is especially true where the administrative appeal authority rejects the evidence even though the presiding officer gave it some credence." Id.

41. ***Universal Camera Corp. v. NLRB***, 340 U.S. 474 (1951); ***Beck v. Mathews***, 601 F.2d 376 (9th Cir. 1979); ***Holland Furnace Co. v. FTC***, 295 F.2d 302 (7th Cir. 1961); NLRB v. International Brotherhood of Electrical Workers, 432 F.2d 965 (8th Cir. 1970). By analogy, the Department of Labor Benefits Review Board Board, similar too the ARB will not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable." ***Cordero v. Triple A Machine Shop***, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979); ***Phillips v. California Stevedore & Ballast Co.***, 9 BRBS 13 (1978).

42. ***Tennessee Valley Authority Act***, 16 U.S.C. § 831t: **Offenses; fines and punishment**
(a) Larceny, embezzlement and conversion All general penal statutes relating to the larceny, embezzlement, conversion, or to the improper handling, retention, use, or disposal of public moneys or property of the United States, shall apply to the moneys and property of the Corporation and to moneys and properties of the United States intrusted to the Corporation.

> **(b)** False **entry, report or statement** Any person who, with intent to defraud the Corporation, or to deceive any director, officer, or employee of the Corporation **or any officer or employee of the United States** (1) makes any false entry in any book of the Corporation, or (2) makes any false **report or statement for the Corporation,** shall, upon conviction thereof,

be fined not more than $10,000 or imprisoned not more than five years, or both.

(c). Conspiracy to defraud Any person who shall receive any compensation, rebate, or reward, or shall enter into any conspiracy, collusion, or agreement, express or implied, with intent to defraud the Corporation **or wrongfully and unlawfully to defeat its purposes**, shall, on conviction thereof, be fined not more than $5,000 or imprisoned not more than five years, or both.

16 U.S.C. § 831t. (May 18, 1933, ch. 32, Sec. 21, 48 Stat. 68)(Emphasis added).

43. 29 CFR §§ 18.38 Ex parte communications.

(a) The administrative law judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. Communications by the Office of Administrative Law Judges, the assigned judge, or any party for the sole purpose of scheduling hearings or requesting extensions of time are not considered ex-parte communications, except that all other parties shall be notified of such request by the requesting party and be given an opportunity to respond thereto.

(b) Sanctions. A party or participant who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including, but not limited to, exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication.

SOURCE: 48 FR 32538, July 15, 1983.

44. *See generally*, 1 Charles H. Koch, ***Administrative Law and Practice*** ' 2.23-.24 (2d ed. 1997); Kenneth C. Davis and Richard J. Pierce, Jr., ***Administrative Law Treatise*** ' 9.5 (3d ed. 1994); Jerry L. Mashaw, ***Due Process in the Administrative State*** 107- 53 (1985); Edward L. Rubin, ***Due Process and the Administrative State***, 72 CALIF. L. REV. 1044, 1130-78 (1984).

45. In some states, there is a prohibition against any *ex parte* communication when the opponent has counsel unless it is made:

(1) in the course of the official proceeding in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer;

(3) orally upon notice to opposing counsel or to the adverse party if not represented by a lawyer; or

(4) as otherwise authorized by law.

Rules Regulating The Florida Bar: Chapter 4. Rules of Professional Conduct, Rule 4-3.5, Impartiality and Decorum of the Tribunal (in part pertinent). Under this rule, OSHA would qualify as an "official".

46. Although the ex parte rule can not be applied at the OSHA level, it may be that the decisional independence of all adjudicators is constitutionally protected. ***Perry v. McGinnis***, 209 F.3d 597, 603-08 (6th cir. 2000) (termination of state ALJ because of agency's disagreement with his decisions states

claim of First Amendment violation); ***Harrison v. Coffman***, 35 F.Supp.2d 722 (E.D.Ark. 1999).

47. On or about September 16, 2001.

48. I permitted the filing, and listened to argument but denied the cross motions on the merits, as material facts were at issue.

49. Although Mr. Fine admitrted that he initialed and sent the brief.

50. I note that the date of this section is contained in the Handbook dated April 5, 2001 and the disputed activity occurred March 30, but the internal OIG investigation was not complete until April 17.

51. " He asked me how I'd feel if one of my workers was, you know, saying his back was hurting, wasn't working and he went to work for somebody else".

52. *See* Case No. 1999-CAA-25, September 10, 1999; CX-1, CX-2.

53. Such a communication must be motivated *at least in part* by protected activity. Id.

54. See ***New York Times v. Sullivan***, 376 U.S. 254, 280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964)).

55. Moreover, if he did not have actual notice he should have known it.

56. Pickett did not address the issue fully by brief or by his Proposed Findings. In ***Berry v. Bd. of Supervisors of LSU,*** 715 F.2d 971 (5th Cir. 1983), cert. denied, 479 U.S. 868 (1986), the Court identified the following three factors as bearing on this determination:

> (1) Subject matter. Do the acts "involve the same type of discrimination, tending to connect them in a continuing violation?" ***Berry*** at 981. See ***Graham v. Adams***, 640 F. Supp. 535, 538-539 (D.D.C. 1986) (continuing violation allegations must connect remote claims to incidents addressed by claims timely filed).
> (2) Frequency. Are the acts "recurring . . . or more in the nature of an isolated work assignment or employment decision?" Berry at 981. Under this factor, a complainant can establish a continuing violation either through a series of discriminatory acts against an individual or a respondent's policy of discrimination against a group of individuals. ***Green v. Los Angeles Cty. Superintendent of Sch***., 883 F.2d 1472, 1480-1481 (9th Cir. 1989). The distinction is between "'sporadic outbreaks of discrimination and a dogged pattern."' ***Bruno v. Western Elec. Co.***, 829 F.2d at 961, quoting ***Shehadeh v. Chesapeake & Potomac Tel. Co.***, 595 F.2d 711, 725 n.73 (D.C. Cir. 1978) (In ***Bruno***, the court focused on the defendant's intent "to take any action necessary to get rid of plaintiff" in affirming the district court's finding of a continuing violation).
>
> (3) Degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the

employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? ***Berry*** at 981.

In considering this factor, the court in ***Waltman v. Int'l Paper Co.***, reasoned: Acts of harassment that create an offensive or hostile environment generally do not have the same degree of permanence as, for example, the loss of a promotion. If the person harassing a plaintiff leaves his job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff a promotion leaves, the plaintiff is still without a promotion even though there is no longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated. 875 F.2d at 476.

All three are lacking based on my findings.

57. In essence, Pickett requests reinstatement to the position he might have had if he had not been injured in 1988. I note that in the prior claim, Pickett had requested re-employment with TVA and that this is contained in CX-2 as an attachment of the materials that TVA sent to OSHA. He wants all of the raises, sick, annual and official leave, promotions, benefits and retirement benefits that he would have accrued "based upon the probability that Mr. Pickett would have been a TVA powerplant production manager or supervisor".

58. See report of Kenneth B. Carpenter, M.D., a board certified psychiatrist (CX-2, 113-116, 133-135). In 1991, Sally T. Avery, Ph.D., diagnosed dysthymia and a somataform pain disorder.

59. I note also cases such as ***Blackburn v. Metric Constructors, Inc***., 86- ERA-4 (Sec'y Oct. 30, 1991) (Decision on damages and attorney fees), slip op. at 14-17. A zero award was given ; complainant suffered little if any economic harm which would have tended to support his assertions of loss of self esteem and metal distress. I do not consider these because I find that Pickett and Green are credible.

60. The verdict also included punitive damages. This is addressed, *infra*.

61. See ***Turturro v. Continental Airlines***, 128 F.Supp.2d 170 (S.D.N.Y., 2001).

62. ***In re: Tennessee Valley Authority***, EPA Docket No. 2000-04-008, EPA Appeals Board, September 15, 2000 Final Order on Reconsideration, on the web at: <http://www.epa.gov/boarddec/disk11/tva.pdf> (188 pages); ***Envirotech Corp. v. Tennessee Valley Authority***, 715 F.2supp. 190 (W.D. Ky. 1998), noting: "TVA was compelled by a consent decree entered in ***Tennessee Thoracic Society v. Aubrey Wagner***, C.A. No. 77-3286-NA-CV (M.D. Tenn. 1978) to reduce the output of fly-ash particulates and sulfur dioxide..." See also ***Duquesne Light Co. V. EPA***, 698 F.2d 456, 469n13 (D.C. Cir. 1983)(TVA joined industry in unsuccessful appeal from EPA pollution regulations).

63. *See* Case No. 1999-CAA-25, September 10, 1999; CX-1, CX-2.

64. Note that Title VII has certain limits on punitive damages based on the number of employees:

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

65. Number 13, using Pickett's numbers in his Proposed Findings.